

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TIMOTHY HOWELL and DEPARTMENT OF THE TREASURY,
BUREAU OF THE MINT, Philadelphia, PA

*Docket No. 00-219; Submitted on the Record;
Issued February 4, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant has met his burden of proof in establishing that he developed a recurrence of disability on or after October 7, 1988 causally related to his May 15, 1980 employment injury.

This case has previously been before the Board on appeal. In a decision dated March 3, 1998, the Board set aside the September 5, 1995 decision of the Office of Workers' Compensation Programs which found that appellant had not established a recurrence of disability on October 7, 1988 causally related to his May 15, 1980 employment injury.¹ The Board found an unresolved conflict in the medical opinion evidence and remanded the claim for further development on the issue of whether appellant's disability beginning October 7, 1988 was causally related to his May 15, 1980 employment injury. The facts and the circumstances of the case as set out in the Board's prior decision are adopted herein by reference.

Following the Board's March 3, 1998 decision, the Office referred appellant for an impartial medical examination.² On May 11, 1999 the Office relied upon a report dated November 3, 1998 from Dr. John D. Ashby, a Board-certified orthopedic surgeon and selected impartial specialist, in denying appellant's claim for disability after October 1988.³ Appellant requested an oral hearing on May 13, 1999 and on June 23, 1999 amended this request to a

¹ Docket No. 96-509.

² Appellant failed to attend the appointment scheduled on July 2, 1998 and by decision dated August 25, 1998, the Office suspended appellant's compensation benefits. The Office vacated this decision on September 8, 1998.

³ In this May 11, 1999 decision, the Office referred to the denial of recurrence of disability as a termination of compensation benefits. The Board notes that its prior decision held that appellant had not met his burden of proof to establish disability for the period in question rather than that the Office failed to meet its burden of proof to terminate. Therefore, the Office's characterization of the February 16, 1994 and September 5, 1995 decisions as terminations is incorrect.

review of the written record. By decision dated September 2, 1999, the hearing representative found that appellant had not established a recurrence of disability on or after October 7, 1988.⁴

The Board finds that appellant has not met his burden of proof in establishing a recurrence of disability on or after October 7, 1988 causally related to his May 15, 1980 employment injury.

As noted above, the Board found in its previous decision a conflict of medical opinion regarding whether appellant's condition on or after October 7, 1988 was causally related to his accepted employment injury. On remand the Board directed that the Office refer appellant to an impartial medical specialist to resolve this conflict. 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 a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.⁵

In his November 3, 1998 report, Dr. Ashby noted appellant's history of injury and performed a physical examination. He found that appellant had a normal objective orthopedic and neurologic examination of the left ankle with full range of motion and an "inconsequential" and "tiny" bone spur on the anterior aspect of the distal tibia. Dr. Ashby stated, "I find no connection with the patient's complaints with the original injury because ... he worked nine years following the original injury before he had to quit. In my opinion, nine years does not constitute a direct relationship to the original injury." He did not recommend further treatment and found no reason that appellant could not function in daily activities.

This report is based on a proper factual background and contains an explanation for Dr. Ashby's opinion that appellant has no current disability due to his accepted employment injury, the lack of objective findings, as well as an explanation for his opinion that appellant's current subjective complaints do not constitute a recurrence of disability causally related to his employment injury, the intervening time period. Dr. Ashby's report must be given special weight and fails to offer support for appellant's claim for recurrence of disability after October 1988. Therefore, the Board finds that appellant has failed to meet his burden of proof.

⁴ On appeal appellant's attorney alleges that this claim should include an inconsequential emotional condition. As the Office has not issued a final decision on this issue, the Board will not address this issue on appeal. *See* 20 C.F.R. § 501.2(c). Appellant's attorney also alleges that appellant is entitled to compensation through the 1999 "termination" decision and that the Board should consider the issue of termination of compensation. As noted above, the Office improperly characterized its prior decisions as terminations of compensation on May 11, 1999. The March 3, 1998 decision of the Board implicitly included the finding that the Office properly rescinded the June 5, 1993 acceptance of appellant's claim for recurrence of the condition after October 7, 1988 on February 16, 1994 based on new medical evidence. Therefore, there has been no termination and no entitlement to continuing compensation.

⁵ *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

The September 2 and May 11, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
February 4, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member