

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM BOWLER and DEPARTMENT OF THE ARMY,
FORT McCOY, WI

*Docket No. 00-2757; Submitted on the Record;
Issued February 11, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's benefits effective September 13, 1998 on the grounds that appellant's injury-related disability had ceased.

On July 31, 1995 appellant, then a 52-year-old supervisory staff administrator, filed a claim (Form CA-1), alleging that on July 26, 1995 he sustained injuries to his back, head, shoulder, leg and hand as a result of falling down stairs.

A magnetic resonance imaging (MRI) scan of appellant's cervical spine was performed on August 17, 1995 by Dr. David Fontaine, a Board-certified diagnostic radiologist. Dr. Fontaine found, "No evidence of herniated disc, spinal stenosis, or neural foraminal narrowing at any level. Minimal cervical spondylosis as described."

On October 10, 1995 appellant's treating physician, Dr. Myron D. Haas, an osteopath, completed an attending physician's report (Form CA-20) and diagnosed cervical arthrosis, lumbosacral sprain and bilateral carpal tunnel. Dr. Haas checked the appropriate box to indicate that appellant's condition was caused or aggravated by his employment. He listed appellant as totally disabled commencing July 31, 1995. On November 16, 1995 Dr. Haas indicated that appellant could return to light duty. He noted that appellant "can do a sedentary type job now only with his neck, back and shoulder." In a November 20, 1995 note, Dr. Haas indicated that appellant could not drive more than 5 miles to and from his job and noted that, since his office was 50 miles from his home, he could not work.

Dr. Haas referred appellant to Dr. Michael H.O. Dawson, a Board-certified orthopedic surgeon. In a letter dated December 18, 1995, Dr. Dawson concluded that appellant sustained injury to the C5-6 and C6-7 discs in the neck and also a lumbosacral disc. He noted that, if his symptoms persisted for 12 months, then there would be a cause for surgical intervention.

By letter dated February 8, 1996, the Office accepted appellant's claim for right leg strain, right shoulder strain and lumbosacral strain.

In a March 28, 1996 report, Dr. Haas reiterated his opinion that appellant has a "C5 and C6-7 disc disruption and also lumbosacral disc disruption and a strain of his right shoulder as a direct result of the work injury of July 26, 1995," and that this was what was causing his musculoskeletal pain.

By letter dated April 8, 1996, the Office referred appellant to Dr. John Lease, a Board-certified orthopedic surgeon, for a second opinion. In a medical report dated April 23, 1996, Dr. Lease diagnosed (1) low back pain with no definite herniated disc, no neurologic deficit; (2) cervical pain with no definite herniated disc, no neurologic deficit; and (3) probable tear of the rotator cuff of the right shoulder. He stated that by appellant's history, these conditions were the result of the July 1995 accident. Dr. Lease opined that appellant was capable of sedentary work. He did not believe appellant was capable of his former job because of the travel requirements. Dr. Lease concluded that appellant was capable of sedentary duty within a 5- to 10-minute driving radius from his house, however, someone else must drive him. Although he did not feel that these were permanent restrictions, he did believe that they were likely to continue into the future. By letter dated June 14, 1996, Dr. Lease responded to the query from the Office by stating that he had reviewed the job description of supervisory staff administrator and believed that appellant was capable of doing that job as described. Dr. Lease reiterated his belief that appellant should not drive a car.

In a medical report dated June 19, 1996, Dr. Haas stated: "At this point, [appellant] has degenerative disc disease of the lumbar spine internal disruption L5, S1, as well as a herniated cervical disc at C5-6 and C6-7." He opined that appellant could not do the supervisory job that was faxed to him. Dr. Haas stated, "Basically, he can only sit and stand to tolerance and there is no way that he could do the job required there."

On October 18, 1996 appellant had a cervical analgesic discogram at C6-7, performed by Dr. Dawson. In a medical report dated November 14, 1996, Dr. Dawson stated:

"Accordingly, it can be stated that [appellant] was involved in a fall down the steps on [July 26, 1995] at which time he suffered a flexion acceleration injury to both the cervical and lumbar spines. As a result of this he sustained herniations to two discs in the neck and internal disc disruption to the L5/S1 disc in the lumbar spine. Since now more than 12 months have passed since the time of the accident [appellant's] symptoms will be permanent unless reconstructive surgery as outlined above is undertaken.

"The prognosis is guarded as [appellant] has now reached maximum medical improvement in the absence of surgery. He has significant disability in as much as he cannot drive his car, he cannot work with his neck flexed for any length of time, he cannot work overhead or with the arms elevated and he cannot bend, crouch, twist, crawl, stoop or kneel."

By letter dated December 30, 1997, a job offer was made to appellant for a position as a modified supervisory staff administrator, with a starting date of January 4, 1998. This was a sedentary position, which required no lifting of greater than 10 pounds and no lifting above shoulder level. The job description noted that, since medical documentation from Dr. Lease restricted appellant from driving, transportation to and from work would be provided.

In a medical report dated February 2, 1998, Dr. Haas noted that he had been treating appellant for “cervical arthrosis as well as a severe degenerative disc of his cervical spine.” He noted that appellant had both cervical and lumbar herniations at C5-6, C6-7 and L5-2-1. Dr. Haas stated:

“Recommendations: I do believe [appellant] is basically very disabled. He is unable to drive at all, he cannot work in a position where he has to keep his neck flexed, he is unable to lift his arms over-head to do any type of work, he cannot bend or crouch, he is unable to kneel, twist, crawl or stoop. Therefore, [appellant] is totally disabled from any form of work. I did review the release for him to attend a job as a supervisor where he would be driven to. I believe he will be unable to tolerate driving in a car, he would be unable to do any type of desk work, walk around for him and he is permanently disabled.”

In his July 15, 1998 medical report, Dr. Haas stated, “I believe [appellant] will never be able to do any manual labor based on his lumbar spine and cervical spine. I do believe within medical certainty that this is all related to his fall at work when he worked at an [a]rmy [b]arracks and tripped over some steps on [July 26, 1995.]”

The Office found that a conflict of medical opinion as to the nature and extent of appellant’s disability for work. By letter dated May 27, 1998, the Office referred appellant to Dr. Joseph R. Sgarlat, a Board-certified orthopedic surgeon, for an impartial medical examination. In a medical report dated June 11, 1998, Dr. Sgarlat reviewed appellant’s medical records and conducted a physical examination. He noted that a review of the x-rays showed that there were no fractures in the spine or right shoulder. Dr. Sgarlat stated that the MRI scan studies in his opinion showed “no evidence of disc herniation in the cervical or lumbar area.” He also noted that there were no neurological deficits on the clinical examination to support any disc herniation producing nerve compression. Dr. Sgarlat stated:

“(1) There is no evidence of residuals of the work-related right leg, right shoulder and lumbosacral strain that occurred on July 26, 1995. (2) I reviewed the MRI scan and [x-rays] taken in August 1995 and find no evidence of a herniated disc that related to the work injury. (3) In my medical opinion, his current symptoms are not related to the work injury. He does have the preexisting low back strain that was diagnosed at the VA Hospitals relating to a lifting injury in 1963. That diagnosis and upgrading of his award appears to be based entirely on his subjective complaints. Objectively, the findings are not supported. (4) In my opinion, the claimant is not disabled from the job he held on the date of his injury as it relates to the injury described above. As requested, I completed the work capacity evaluation. (5) In my opinion, he recovered from those sprains, bumps and bruises on the average of a few weeks or, at most, a few months after the

injury. As to what treatment is recommended, none, in my opinion. My overall impression is that his subjective complaints far outweigh any objective findings either on physical examination or on the basis of the special studies that were performed.”

On July 6, 1998 the Office issued a notice to terminate appellant’s compensation. The Office noted that the weight of the medical evidence rested with the impartial medical examiner, Dr. Sgarlat.

In an August 4, 1998 letter, appellant’s attorney requested reconsideration and submitted further medical reports. Appellant’s attorney specifically noted that neither appellant nor he were given the “opportunity to participate in the selection process of the impartial specialist, the report of Dr. Sgarlat should receive no special weight and cannot resolve a conflict in the medical evidence.”

In a medical report dated July 15, 1998, Dr. Haas indicated that he believed that appellant would never be able to do any manual labor based on his lumbar spine and cervical spine and that within medical certainty, this was related to his work-related fall on July 26, 1995.

In a report dated July 20, 1998, Dr. Dawson noted that the herniated disc he saw in the MRI scan August 18, 1995 was a direct result of the injury sustained on July 26, 1995. He noted that prior to that time appellant did not suffer neck pain nor shoulder pain nor did he suffered numbness or tingling in any of the fingers on either hand.

Appellant also submitted a medical report dated July 30, 1998, Dr. Gregory Gullo, a Board-certified anesthesiologist with a specialty in pain management, he stated:

“At this time, in addition to having these spinal disruptions, [appellant] has significant muscular deconditioning which most likely has resulted from an extremely sedentary lifestyle over the past three years following his accident. The therapist believes, as I have suspected, that it is difficult to determine exactly what level of functioning [appellant] can achieve in that the aggressive careful physical therapy may be able to improve his level of functioning beyond what he believes is possible. I would state that I do believe that [appellant] would be capable of some sedentary work provided that he would be able to obtain more flexion of his neck in a comfortable manner. Additionally, I think at this time, it is unrealistic to think that [appellant] would be able to perform the physical requirements necessary to participate in the Army [R]eserves.

By decision dated August 24, 1998, the Office terminated appellant’s benefits effective September 13, 1998. The Office based its decision on the report of the impartial medical examiner, Dr. Sgarlat, who indicated that appellant’s injury-related disability had ceased.

A hearing was held on July 21, 1999, at which appellant testified that in order to maintain his position, he must be in the reserves and that he was “thrown out” of the reserves” due to this injury. He further testified that his condition has gotten worse since the injury.

By decision dated March 10, 2000, the hearing representative affirmed the Office's August 24, 1998 decision.

By letter dated August 11, 2000, appellant requested reconsideration. Appellant submitted two new medical reports. In a July 27, 2000 opinion, Dr. Dawson noted his disagreements with Dr. Sgarlat's evaluation and reiterated his belief that appellant sustained a significant injury to his cervical spine when he fell down the stairs and that "his symptoms persist to this day. In a June 15, 2000 report to Dr. Dawson, Dr. Mohammad Aslam, a Board-certified neurologist, stated that appellant had evidence of a C7 radiculopathy most likely due to the C6-7 disc herniation.

By decision dated August 25, 2000, the Office denied modification of the Office's March 10, 2000 decision.

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits.

It is well established that once the Office has accepted 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. Thus, the burden of proof is on the Office rather than the employee with respect to the period subsequent to the date when compensation is terminated or modified.¹

In the present case, the Office accepted appellant's claim for right leg strain, right shoulder strain and lumbosacral strain. The Office reviewed the medical evidence and determined that a conflict existed in the medical evidence between appellant's treating physicians, Drs. Haas and Dawson and Dr. Lease, an Office referral physician. Where there exists a conflict of medical opinion 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, is entitled to special weight.²

The impartial medical examiner, Dr. Sgarlat, reviewed appellant's history, reviewed his medical records and also conducted a physical examination of appellant. He found no signs of any fractures in the spine or shoulder and noted that the MRI scan studies showed no evidence of disc herniation in either the cervical or lumbar area. Dr. Sgarlat specifically found "no evidence of residuals of the work-related right leg, right shoulder and lumbosacral strain that occurred on [July 26, 1995.]" He did not believe that appellant's current symptoms were related to his work injury or that he was disabled from the job he held on the date of his injury. As Dr. Sgarlat's opinion is sufficiently well rationalized and based upon a proper factual background, it is given determinative weight.

¹ *Eddie Franklin*, 51 ECAB ____ (Docket No. 98-1240, issued December 14, 1999); *Craig M. Crenshaw, Jr.*, 40 ECAB 919, 922 (1989).

² *William Morris*, 52 ECAB ____ (Docket No. 01-475, issued June 15, 2001); *Aubrey Belnavis*, 37 ECAB 206 (1985).

The Board is not persuaded by appellant's argument that he was deprived of the opportunity to participate in the selection of the impartial medical examiner. The Office properly notified appellant of the examination scheduled with Dr. Sgarlat and provided appellant an opportunity in conjunction with that notice to raise any objection with the selection of the impartial physician prior to the examination. Appellant, however, did not object to the selection of Dr. Sgarlat and instead attended the examination as scheduled. Because appellant did not follow Office procedures for participating in the selection of the impartial medical specialist, the Board finds no error on behalf of the Office in its selection of Dr. Sgarlat.³

Appellant contends that the July 27, 2000 report by Dr. Dawson and the June 15, 2000 report by Dr. Aslam created a new conflict in the evidence. However, these reports are insufficient to overcome the special weight given to the opinion of the impartial medical examiner, Dr. Sgarlat. Dr. Aslam saw appellant at the request of Dr. Dawson and Dr. Dawson was on one side of the conflict that Dr. Sgarlat resolved. Accordingly, their additional reports are insufficient to overcome the weight accorded Dr. Sgarlat's report as the impartial medical specialist's report or to create a new conflict with it.⁴

The August 25 and March 10, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
February 11, 2002

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

³ See *David Alan Patrick*, 46 ECAB 1020 (1995).

⁴ See *Dorothy Sidewell*, 41 ECAB 857, 874 (1990).