

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HAMMOND C. HOSMER, JR. and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, Jacksonville, FL

*Docket No. 02-87; Submitted on the Record;
Issued July 25, 2002*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation.

Appellant's claim filed on March 28, 1994 was accepted for aggravation of Meniere's disease.¹ Appellant, then a 48-year-old tax appeals officer, stopped work in February 1994 and retired on disability effective June 29, 1994, but elected wage-loss benefits under Federal Employees' Compensation Act.

By decision dated July 12, 1996, the Office reduced appellant's compensation on the grounds that he had the capacity to earn wages as a bookkeeper. Appellant requested a hearing, which was held on June 26, 1997. The hearing representative affirmed the reduction of compensation on October 23, 1997 and the Office denied modification of its prior decision on November 27, 1998.

Subsequently, the Office asked appellant's physician, Dr. John A. Fetchero, an osteopathic practitioner and Board-certified otolaryngologist, to opine whether the work-related aggravation of Meniere's disease had ceased. The Office also referred appellant for a second opinion evaluation to Dr. Jeffrey P. Robbins, also a Board-certified otolaryngologist.

Based on Dr. Robbins' December 29, 1999 report, the Office issued a notice of proposed termination of compensation on January 7, 2000. Appellant disagreed, stating that the concept of temporary aggravation made no sense and that his claim had been accepted on the basis of a permanent partial disability due to the worsening of the disease as a result of job stress. He contended that his disease got permanently worse because of his job and submitted two reports from Dr. Fetchero.

¹ Meniere's disease is a disorder of the inner ear characterized by symptoms such as sudden attacks of vertigo, tinnitus and hearing fluctuation or loss.

On February 15, 2000 the Office terminated appellant's compensation on the grounds that the weight of the medical evidence established that the aggravation of Meniere's disease was temporary and that the natural progression of the underlying condition was not work related. Appellant requested reconsideration and submitted further medical evidence. On January 29, 2001 the Office denied modification of its prior decision. On July 3, 2001 the Office again denied modification after reviewing evidence submitted by appellant which the Office had not considered previously.

The Board finds that the Office failed to meet its burden of proof in terminating appellant's medical and wage-loss benefits due to the 1994 work injury.

Under the Federal Employees' Compensation Act,² when employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation for the periods of disability related to the aggravation.³ However, when the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased.⁴ This is so even though the underlying condition may remain and may disable the employee for work.⁵ Also, the possibility that another exacerbation may recur should the employee return to work is not a basis for further benefits.⁶

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.⁷ Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.⁸

In this case, the Office accepted an aggravation of appellant's underlying Meniere's disease as related to job stress. The Office asked appellant's treating physician if appellant's work had caused "a temporary exacerbation of the underlying disorder or a permanent worsening of his condition." In a report dated October 5, 1994, Dr. Fetchero replied that stress was the

² 5 U.S.C. §§ 8101-8193.

³ *Elizabeth Stanislav*, 49 ECAB 540, 541 (1998).

⁴ *Raymond W. Behrens*, 50 ECAB 221, 222 (1999). The Office's procedure manual states that temporary aggravation occurs when a preexisting condition is worsened or made more severe for a time and then reverts to its prior state. There is no residual alteration of the underlying condition that was aggravated and no continuing impairment. Permanent aggravation is when there is a continuing and irreversible change in the underlying condition, thus adversely altering the course of the condition or disease process. Federal (FECA) Procedure Manual, Claims -- *Causal Relationship*, Chapter 2.805.2.b (June 1995).

⁵ *John Watkins*, 47 ECAB 597, 600 (1996).

⁶ *Beverly Diffin*, 48 ECAB 125, 129 (1996).

⁷ *Betty M. Regan*, 49 ECAB 496, 501 (1998).

⁸ *Raymond C. Beyer*, 50 ECAB 164, 168 (1998).

precipitating factor in causing the onset of an episode at work in February 1994. In response to whether it was temporary or permanent, Dr. Fetchero stated:

“[B]ased on [appellant’s] testimony to me, he is unable to work in his previous employment, [which] is of such a stressful nature that it does indeed cause precipitation of his Meniere’s which appears to have progressed since the first time I saw him [in 1990].”

Dr. Fetchero completed a work form and recommended vocational rehabilitation. He also stated on a December 15, 1994 form report that permanent effects of the work-related injury would be progressive hearing loss and vertigo.

In response to the Office’s December 9, 1999 question of whether the aggravation of appellant’s Meniere’s disease had ceased or not, Dr. Fetchero stated that he saw appellant on November 11, 1999 and had not seen him since October 1997. Dr. Fetchero stated that appellant had the same condition which he had in 1994, which might possibly be worse than it was then. There was no change in appellant’s status that would allow him to return to work.

In a January 20, 2000 letter, Dr. Fetchero noted that appellant was totally disabled in 1994 because of Meniere’s disease, that he reported his present symptoms as similar to then and that every time he was in a stressful situation, he would have flare-ups of vertigo. Dr. Fetchero stated that returning appellant into an environment in which he was originally disabled would only serve to worsen his disease.

In a February 14, 2000 report, Dr. Fetchero stated that prior to 1994 appellant attempted to work, but the stress of the job caused his Meniere’s disease to progress and become worse until he was “granted a permanent disability status.” Afterwards, he “never again returned to his predisability status regarding his Meniere’s disease and the permanent damage had been sustained.” Appellant’s disease was essentially unchanged from that of 1994 when he was found to be disabled. Dr. Fetchero then reviewed Dr. Robbins’ report and found ‘no great disagreement with his analysis.’ However, when granted his disability status in 1994 appellant had already progressed to a level that rendered him totally disabled. He concluded:

“[Appellant’s] disease has not improved to a level greater than it was in 1994. In spite of the fact that [appellant] has other stress, the damage has already been done and I find it in no way reasonable that [appellant] should be removed from a permanent disability status.”

The second opinion physician, Dr. Robbins, stated that appellant last worked in 1994 when he was unable to cope with the constant hostility and confrontation of position as an appeals officer. He explained:

“One can[no]t at this time blame the pressures of his federal employment on [appellant’s] continuing Meniere’s symptomatology.... The stress that [appellant] relates to at this time is of a personal nature. The Meniere’s disorder was not caused by [appellant’s] federal employment or any other employment. It was the opinion of his physicians that professional stress was a major aggravating factor in his disease. The professional stress has been removed but stress in his personal life continues unabated and [appellant] continues to report Meniere’s episodes. Certainly his [former] employment can[no]t at this time be implicated in the continuation or progression of his Meniere’s disorder. [Appellant’s] professional stress aggravating his Meniere’s was limited to his work period and is not now a factor.”

Dr. Robbins added that appellant by history was susceptible to the negative consequences of psychological stress and was now experiencing the same negative effects from stress in his personal life. Appellant was unable to cope with the constant hostility and confrontation of his previous position, but his current symptomatology and any future negative complaints or symptoms of Meniere’s disorder could not be blamed on his previous federal employment, which ended in 1994.

In an April 11, 2000 report, Dr. M. Barry Ellis, a Board-certified otolaryngologist, stated that he had reviewed the information and records provided by Drs. Fetchero and Robbins. He noted that appellant’s condition was “provoked” by stress in the workplace and that appellant had attempted to return to work about six times but each time experienced stress. Dr. Ellis agreed with Dr. Fetchero that the stress of the workplace caused appellant’s Meniere’s disease to progress and that appellant never again returned to his full predisability status.

The Board finds that the opinion of Dr. Robbins that appellant had no residuals of the aggravation of his Meniere’s disease conflicts with that of Dr. Fetchero that the work stress caused a permanent worsening of appellant’s underlying condition. Dr. Robbins believed that once the job stress was removed, appellant’s condition returned to baseline. Dr. Fetchero opined that the preexisting condition was permanently worsened by the job stress in 1994 and did not return to its pre-1994 status.

Because there is a conflict in medical opinion, the Office failed to meet its burden of proof to establish that appellant had no residuals of the work-related job stress.⁹ Therefore, the termination of compensation will be reversed.

⁹ See *Mary A. Moultry*, 48 ECAB 566, 568 (1998) (finding that a continuing conflict in the record over whether appellant had any residuals of the accepted lumbar strain required reversal of the Office’s termination of compensation).

The July 3 and January 29, 2001 decisions of the Office of Workers' Compensation Programs are reversed.

Dated, Washington, DC
July 25, 2002

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member