

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELLIOTT D. OVERTON and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, Memphis, TN

*Docket No. 02-245; Submitted on the Record;
Issued July 2, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits effective July 16, 2000.

Appellant, a 44-year-old tax examiner filed a notice of traumatic injury on March 25, 1987 alleging that on March 24, 1987 he slipped and fell in the performance of duty injuring his neck and left shoulder. The Office accepted appellant's claim for contusion of the right shoulder and cervical spine. The Office later expanded appellant's claim to include permanent aggravation of osteoarthritis of the cervical spine with radiculopathy of the right upper extremity. The Office entered appellant on the periodic rolls on July 9, 1993.

On August 5, 1999 the Office proposed to terminate appellant's compensation benefits. On September 8, 1999 the Office finalized the decision terminating appellant's compensation benefits effective September 12, 1999. By decision dated October 13, 1999, the Office modified the September 8, 1999 decision to grant additional compensation. Appellant requested an oral hearing on October 9, 1999. By decision dated February 8, 2000, the Branch of Hearings and Review remanded the case to resolve a conflict of the medical opinion evidence.

The Office referred appellant for an impartial medical examination. Based on this examination, the Office proposed on June 5, 2000 to terminate appellant's compensation benefits. By decision dated July 6, 2000, the Office terminated appellant's compensation benefits, but found that he was entitled to continuing medical treatment for his accepted conditions. Appellant requested an oral hearing. By decision dated August 16, 2001 and finalized August 17, 2001, the hearing representative affirmed the July 6, 2000 decision.

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

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.¹ 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.²

In this case, appellant's attending physician, Dr. K. Blake Ragsdale, an orthopedic surgeon, completed a report on May 28, 1998 and indicated that appellant could return to full duty. The Office referred appellant for a second opinion evaluation with Dr. Austin Tyrer, Jr., a Board-certified neurosurgeon. In a report dated June 30, 1999, Dr. Tyrer noted appellant's history of injury and medical treatment. He diagnosed mild to moderate cervical spondylosis at C5-6 and C6-7. Dr. Tyrer stated that appellant could perform his regular duties and stated that appellant's return to work in September 1998 did not modify or aggravate his preexisting condition.

Appellant submitted medical evidence from Dr. John P. Howser, a Board-certified neurosurgeon. In a report dated March 23, 1999, Dr. Howser reviewed appellant's history of injury and reported his physical examination. He noted that appellant's preexisting conditions of arthritis and degenerative disc disease were not caused by his employment injury, but that these conditions were aggravated by the employment injury. Dr. Howser stated that appellant was doing well until his employment injury and that his September 1998 return to work resulted in increased symptoms. On September 1, 1999 Dr. Howser stated that appellant might require surgery and opined that he could not return to his date-of-injury position as his September 1998 return to work resulted in a worsening of his condition.

The Office properly found a conflict of medical opinion evidence between appellant's physician, Dr. Howser and the Office referral physician Dr. Tyrer. Section 8123(a) of the Federal Employees' Compensation Act,³ provides, "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."

The Office referred appellant for an impartial evaluation with Dr. James R. Feild, a Board-certified neurosurgeon. In a report dated April 26, 2000, Dr. Feild noted appellant's history of injury and that appellant had loss of range of motion in his neck with normal strength and reflexes. Dr. Feild noted that appellant's December 29, 1999 magnetic resonance imaging (MRI) scan revealed degenerative disease at C4, C5 and C6. He diagnosed cervical spondylosis with cervical disc syndrome. Dr. Feild recommended an electromyogram (EMG) and reviewed these results on May 15, 2000. He found that the EMG did not reveal any significant electrodiagnostic evidence of an active cervical radiculopathy of C6 or C7 level. Dr. Feild opined that appellant's current condition was the result of his accepted employment injury. Dr. Feild stated that he reviewed appellant's job description and believed that appellant could

¹ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

² *Id.*

³ 5 U.S.C. §§ 8101-8193, 8123(a).

perform the duties of his date-of-injury position. He stated that appellant's September 1998 return to work resulted in a temporary aggravation of appellant's condition with no objective evidence that his condition was worsened as a result of this. Dr. Feild indicated that surgery was an option for appellant.

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.⁴ The Board finds that Dr. Feild's report is entitled to the weight of the medical evidence. He based his opinions on the proper factual background, provided his findings on physical examination and review of diagnostic studies and reviewed appellant's position description. Based on the factual and medical evidence before him, Dr. Feild concluded that appellant was capable of returning to his date-of-injury position.⁵

Appellant submitted two reports from Dr. W. Craig Clark, a Board-certified neurosurgeon. On January 12, 2000 Dr. Clark reviewed the December 29, 1999 MRI and found a large ruptured disc at C6-7 right paracentral as well as some osteophytic compression at the right C5-6. Dr. Clark recommended surgery. These reports do not provide an opinion on the causal relationship between appellant diagnosed condition and his accepted employment injury.

As the medical evidence of record establishes that appellant was capable of returning to his date-of-injury position, the Office met its burden of proof to terminate appellant's compensation benefits. Appellant remains entitled to medical treatment for his accepted conditions.

⁴ *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

⁵ The Board further notes that the medical evidence of record supports that appellant requires ongoing medical treatment of his accepted condition and that Dr. Feild along with appellant's physicians suggested that surgery may be appropriate. The Office authorized surgery on February 25, 1993.

The decision dated August 16, 2001 and finalized on August 17, 2001 of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
July 2, 2002

Michael J. Walsh
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member