U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLES L. MCINTYRE and DEPARTMENT OF THE NAVY, PHILADELPHIA NAVAL SHIPYARD, Philadelphia, PA

Docket No. 01-1298; Submitted on the Record;
Issued June 5, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
WILLIE T.C. THOMAS

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

The case has been on appeal previously on the issue of termination of compensation.[1] In a May 11, 1988 decision, the Board noted that appellant sustained a back injury on October 19, 1982 while lifting an angle iron. The Office accepted appellant's claim for a lumbar strain and paid temporary total disability compensation through May 10, 1987 when it terminated appellant's compensation on the grounds that his disability was no longer related to the effects of the employment injury. The Board reversed the Office's decision, as the Office had not given to the impartial medical specialist additional medical evidence for a clarification of his opinion, based on that evidence. The Board found that the Office had not met its burden of proof in terminating appellant's compensation. The facts and the findings of that decision are incorporated herein.

In a December 22, 2000 decision, the Office again terminated appellant's compensation effective December 31, 2000 on the grounds that the weight of the medical evidence of record established that appellant had no continuing disability as a result of the employment injury. Appellant requested a review of the written record by an Office hearing representative. In an April 10, 2001 decision, the Office hearing representative affirmed the December 22, 2000 decision of the Office.

The Board finds that the Office improperly terminated appellant's compensation.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation

[1] Docket No. 88-517 (issued May 11, 1998).

without establishing that the disability has ceased or that it is no longer related to the employment.[2]

In a May 14, 1992 report, Dr. Stephen Horowitz, a Board-certified orthopedic surgeon, acting as an Office referral physician, stated that appellant was suffering from mechanical low back pain without radiculopathy. He noted that an October 23, 1984 computerized tomography (CT) scan showed some bulging at L4-5 and L5-S1 annulus with no evidence of disc herniation and no significant bulging abnormalities. Dr. Horowitz opined that appellant's employment injury was not the cause of his current symptoms of back pain. He indicated that appellant could work at activities that did not require heavy lifting.

In a February 10, 1994 report, Dr. Frank A. McGowan, an osteopath, stated that appellant had atrophy in his left leg, discogenic radiation down both legs and chronic radicular syndrome. He indicated that he was still treating appellant for the effects of the employment injury.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Samuel Broudo, a Board-certified orthopedic surgeon, to resolve the conflict in the medical evidence. In a June 24, 1994 report, Dr. Broudo diagnosed resolved lumbosacral strain, left L4 and L5 radiculopathy, degenerative joint disease at L4-5 and L5-1 and atrophy of the right thigh. He stated that the effects of the October 18, 1982 employment injury had ceased. Dr. Broudo commented that appellant was only partially disabled for any employment. He indicated that the electromyogram (EMG) results suggested a recent denervation rather than a long-standing condition. Dr. Broudo noted that a recent magnetic resonance imaging (MRI) scan did not show any disc herniation.[3]

In a December 28, 1994 report, Dr. James T. McGlynn, a Board-certified orthopedic surgeon, stated that a CT scan of appellant's cervical spine showed a small mild disc herniation at C6-7 with spinal stenosis. He noted that a myelogram showed an extradural defect at L4-5 with narrowing of the thecal sac and facet joint hypertrophy at L3-4, L4-5, L5-S1, causing spinal stenosis. Dr. McGlynn indicated that an EMG was positive for left L4-5 radiculopathy. Dr. McGlynn concluded that appellant's current symptoms were related to his employment injury.

In a January 16, 1998 report, Dr. Joel P. Mascaro, an osteopath, stated that appellant had consistent and reproducible pain in the cervical and lumbar areas, directly correlated to the areas injured in the employment injury. He indicated that the pain and objective symptoms, such as muscle spasms and positive EMG and MRI reports, were chronic in nature. Dr. Mascaro commented that appellant was subjected to flare-ups on a regular basis that prohibit him from performing any productive work. He noted that appellant's range of motion in the cervical and lumbar regions had been reduced because the normal elastic tissue had been replaced by less elastic fibrotic tissue. Dr. Mascaro concluded that appellant's injuries were a direct result of the employment injury.

[2] *Jason C. Armstrong*, 40 ECAB 907 (1989).

[3] The Office proposed to terminate appellant's compensation on the basis of Dr. Broudo's report but did not issue a final decision at that time.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Richard J. Mandel, a Board-certified orthopedic surgeon, for an examination and a second opinion. In an October 29, 1998 report, Dr. Mandel stated that appellant presented with diagnostic studies suggesting a left-sided disc herniation at L4-5 and an EMG from March 1994 which suggested L4-5 radiculopathy at that time. He indicated that his examination did not confirm the presence of severe radiculopathy. Dr. Mandel concluded that appellant had recovered from any radiculopathic process from which he may have been suffering. He also stated that appellant had recovered from any strain and sprain injury which he may have sustained while working in 1982. Dr. Mandel noted evidence of degenerative disc disease of the lumbar spine. He indicated that appellant would be capable of working on a light-duty basis full time. Dr. Mandel stated that appellant's restrictions would be related to the normal aging process and not to any ongoing injury from which he appeared to be recovered.

In an April 6, 1999 report, Dr. Steven D. Grossinger, an osteopath, stated that appellant had muscle spasms and tenderness in the left lumbar region, positive straight leg raising at 60 degrees on the left and hypesthesia in the lateral aspect of the left leg. He stated that appellant had low back pain following a work-related injury in 1982 and ongoing evidence of radiculopathy. In an April 20, 1999 report, Dr. Grossinger stated that appellant had an abnormal EMG, showing chronic denervation in the left L4-5 innervated myotomes and related paraspinous muscles. He indicated that the abnormality correlated clinically with his symptoms, which had been chronic since appellant's employment injury. Dr. Grossinger stated that other medical reports supported that these abnormalities were caused by the employment injury. He concluded that appellant was unfit for his prior position as a shipwright carpenter and stage builder.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. William H. Simon, a Board-certified orthopedic surgeon, to resolve the conflict in the medical evidence. In a February 25, 1999 report, he diagnosed degenerative joint disease and intervertebral disc disease of the lumbar spine. Dr. Simon commented that it was difficult to determine what happened to appellant when he was injured, based on appellant's examination and reviewed the medical records. He indicated that appellant's current symptoms were compatible with lumbar stenosis and lumbar root irritation. Dr. Simon noted that the stenosis might be partially the problem of a protruding disc. He stated that appellant was deconditioned from his heavy work situation since he had not worked in 17 years. Dr. Simon added that he did not expect appellant to be able to return to that type of work. He recommended that appellant be referred for a functional assessment to determine the type of work he could perform.

The Office referred appellant for a fitness-for-duty examination. In a February 17, 2000 report, a physical therapist indicated that appellant arrived for the examination and asked the purpose of the examination. He was informed that the examination was to determine his safe capabilities. Appellant requested to discuss the examination with his attorney and his personal physician because he had a heart attack approximately six months previously and was not sure of

the reasons for his participation in the test. He noted that he wanted to get a medical clearance from his physician and a legal clearance from his attorney before he participated in the tests.[4]

In an April 13, 2000 report, Dr. Simon noted that appellant's treating physician did not address whether appellant could undergo a functional capacity examination. He stated that appellant's diagnoses, as given by Dr. McGlynn, would not be a contraindication for appellant to undergo the examination and were the reason for his referral of appellant for the examination. In an April 26, 2000 report, Dr. Simon indicated that he had discussed the case with appellant's treating physician who stated appellant could not lift 80 pounds. Dr. Simon interpreted the statement as the reason appellant could not undergo the functional capacity examination. He stated that, as appellant could not undergo the examination, he had nothing further to offer in terms of evaluating appellant's ability to return to work. Dr. Simon concluded that appellant was unable to undergo the examination due to medical reasons which were not related to any injuries sustained in a work-related accident.

The Office determined that a new impartial medical examination was needed due to the lapse of time between Dr. Simon's first examination and his updated report. The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Thomas C. Peff for an examination to resolve the conflict in the medical evidence. In a July 26, 2000 report, Dr. Peff stated that he was unable to obtain a history from appellant because he was belligerent and ended the examination early. He related that appellant became aggravated when he was requested to repeat certain maneuvers, stated that he had enough, got dressed independently and walked out of the examination room. Dr. Peff reported that appellant had no evidence of paravertebral muscle spasm in the lumbar spine. He stated appellant had no significant radicular findings in either leg. Dr. Peff diagnosed degenerative arthritis in the lumbar spine, which was not related to his employment injury. He indicated that the diagnosed condition of a lumbar sprain, lumbosacral radiculopathy and degenerative joint disease of L4-5 and L5-S1 were not related to the employment injury. Dr. Peff stated that any soft tissue injury or any disability resulting from the employment injury had resolved. He indicated that he was not able to determine when appellant's total disability due to the employment injury had resolved. Dr. Peff commented that his opinion was based on his examination and a review of appellant's medical records for the prior 18 years. He stated that any restrictions placed on appellant's ability to work were not related to the employment injury and added that further treatment based on the reported employment injury was not appropriate. Dr. Peff indicated that there was no evidence that the work-related injury sustained in 1982 was active and causing objective findings. He concluded that appellant did not continue to suffer from the residuals of the employment injury but from his left-sided stroke, hypertensive heart disease and musculoskeletal problems due to his degenerative arthritis and peripheral vascular disease.

In situations when there exists opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper

[4] Appellant submitted medical evidence showing that he had been treated for a stroke in April 1998 and June 1999. In a March 20, 2000 letter, the Office proposed to suspend appellant's compensation on the grounds that he obstructed a medical examination.

factual background, must be given special weight.[5] Dr. Peff, in his report, concluded that the conditions accepted by the Office were not caused by appellant's employment. However, he did not present any rationale on how he reached that conclusion but only presented the conclusion. Dr. Peff also stated that the effects of appellant's employment injury had ceased, based on the assumption that appellant only sustained soft tissue injuries as a result of the employment injury. Once again, Dr. Peff did not present an explanation for his conclusion but only a conclusion. His report contradicts the Office's acceptance that appellant sustained lumbar radiculopathy and degenerative joint disease at L4-5 and L5-S1 as a result of the employment injury. Dr. Peff stated that appellant showed no evidence of radiculopathy but did not address the EMG reports which, as recently as Dr. Grossinger's April 20, 1999 report, showed appellant had chronic denervation in the L4-5 distribution. Dr. Peff's report, therefore, has little probative value because it is lacking in rationale to support the conclusions reached by Dr. Peff and does not address recent objective medical evidence which supports appellant's complaints of pain and disability. His report, therefore, is not entitled to any special weight. As the Office's decision to terminate appellant's compensation was based on Dr. Peff's report, the Office has not met its burden of proof in terminating appellant's compensation on the grounds that the effects of his employment injury have ceased.

The decision of the Office of Workers' Compensation Programs dated April 10, 2001 is hereby reversed.

Dated, Washington, DC
June 5, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

[5] *James P. Roberts*, 31 ECAB 1010 (1980).