

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD S. DANN and DEPARTMENT OF THE NAVY,
NAVAL WEAPONS STATION EARLE, Colts Neck, NJ

*Docket No. 00-2055; Submitted on the Record;
Issued March 27, 2002*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate wage-loss benefits after January 20, 1999.

The Office accepted that on March 14, 1995 appellant, then a 40-year-old public works superintendent, sustained the conditions of herniated discs at L3-4, L4-5 and S1 radiculopathy. Appellant stopped working shortly after the injury and has not returned. In a letter dated April 27, 1998, the Office proposed to terminate appellant's entitlement to wage-loss compensation and medical benefits based on the weight of the medical evidence as represented by Dr. Stanley R. Askin, a Board-certified orthopedic surgeon, whom the Office had selected to resolve the conflict in medical opinions regarding whether appellant could return to any type of employment. By decision dated January 20, 1999, the Office terminated appellant's entitlement for wage-loss compensation and medical benefits effective the same date. Appellant requested an oral hearing, which was held on September 22, 1999 and submitted additional medical and factual evidence in support of his claim. In a decision dated March 2, 2000, an Office hearing representative affirmed the termination of wage-loss compensation, but modified its earlier decision to reflect entitlement to on-going medical treatment.

The Board finds that the Office met its burden of proof to terminate wage-loss benefits.

Once the Office accepts a claim, the Office may not terminate or modify compensation without establishing that the disability has ceased or that it is no longer related to the employment.¹ In this case, appellant was employed as a public works superintendent when he injured his lower back on March 14, 1995. The Office accepted the conditions of herniated discs at L3-4, L4-5 and S1 radiculopathy. Appellant stopped working shortly after the injury and has not returned.

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

Due to a conflict in medical opinion evidence between appellant's treating physicians and the Office referral physician, Dr. Mark Schwartz, a Board-certified orthopedist, regarding whether appellant was able to return to any type of employment, the Office referred appellant to Dr. Askin for an impartial evaluation.² In his July 3, 1997 report, Dr. Askin reviewed appellant's history of injury including a nonwork-related motor vehicle accident of May 1993. He noted that appellant had returned to work in a limited-duty capacity about May 1994 with the goal of eventually getting back to full duty as tolerated. Appellant was working in such capacity until his work injury of March 14, 1995. Dr. Askin performed a physical examination and provided the results thereof. He indicated that the statement of accepted facts noted appellant's work injury of March 14, 1995, that appellant stopped working May 10, 1995 and that appellant had a May 1993 motor vehicle accident with significant complications from a resultant neck surgery, which included pulmonary emboli and hypertension. Dr. Askin diagnosed lumbar spondylosis apparently exacerbated by the March 14, 1995 occurrence. Taking into account appellant's history and the objective examination findings, Dr. Askin advised that, although appellant has some residual effects of the March 14, 1995 occurrence, they were not significant as the limitations appellant were presenting were based on factors under his control.

During his examination of appellant, Dr. Askin stated the following:

“Shoulder range of motion was significantly limited by [appellant] showing only 135 degrees of forward flexion and abduction on the right and 120 degrees on the left. On the right, he complained that shoulder motion hurt his neck and on the left that it hurt the left shoulder. He offers full range of motion of his elbows, forearms, wrists, fingers and thumbs. He has negative Wartenberg's, Froment's and crossfinger signs of ulnar nerve dysfunction. Thenar function is intact. He has negative Phalen's bilaterally, and the Tinel's was negative on the right and positive on the left. I should mention with respect to the Phalen's [test], that before he even assumed the Phalen's position, the left fourth and fifth digits and right fifth digit were, in his description, numb before he started. Deep tendon reflexes at biceps and triceps [were] symmetrical. He has a negative Finkelstein's test for de Quervain's and negative intersection sign. Muscle function of the trapezius, latissimus dorsi, pectoralis major, deltoids, biceps, triceps, wrist flexors and wrist extensors were all intact though he did not exert strenuously.”

² Section 8123(a) of the Federal Employees' Compensation Act 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.” 5 U.S.C. §§ 8101-8193, 8123(a).

With respect to the lower extremities, Dr. Askin stated that appellant was not fully forthcoming. He stated:

“For instance, I could see that the toe motors were visibly working on the left, but when I asked him to exert against my manual resistance he would apply no effort. All of the muscle groups of the lower extremities to include the hip abductors, hip adductors, hip flexors, hip extensors, quadriceps, hamstrings and ankle and toe motors were otherwise preserved for the right lower extremity though he indicated that it hurt and on the left lower extremity lacked any effort for each of the muscle groups. Nevertheless, the calf circumferences were 43½ cm and it was observed that he had no visible atrophy of the muscle groups for either the upper or lower extremities. The straight leg raising done while seated on the right was associated with back discomfort at about 70 degrees and on the left discomfort in the area of the buttock going down to the left anterior proximal tibial region. Deep tendon reflexes at the knees and ankles are symmetrical.”

Dr. Askin further noted that the manner in which appellant carried his left lower extremity was the sort one would see with a central nervous system process, such as a stroke victim and not someone with peripheral neuropathy on the basis of a back injury. He stated that “[W]hen he walked, he did actually drag the foot on the ground whereas someone who wished to walk with a paralytic problem, would have flexed the knee and the hip in what is termed a steppage gait. It is my considered opinion that the manner in which [appellant] is carrying on is under his willful control and not a problem due to a significant physical ailment (if he has a significant physical ailment it is significantly overshadowed by that which is under his voluntary control).”

Dr. Askin noted that he was provided a list of prospective duties for appellant.³ He opined that as the prospective duties offered were of a clerical nature, appellant could do all of the clerical activities required either at home or onsite at his place of employment. Dr. Askin further opined that appellant could work on a full-time basis and suggested that, if appellant’s employer was willing to provide appellant with the necessary equipment to work from home, it would eliminate appellant’s need to commute.

Following Dr. Askin’s July 3, 1997 examination, appellant submitted several reports documenting his medical condition from his treating physicians.⁴ These include May 6 and 20, June 24, July 22, August 26 and October 2, 1998 reports from Dr. Peter D. Corda, an osteopath; February 17, April 28 and November 24, 1998 from Dr. Barry Gleimer, an osteopath; a July 15, 1998 report from Dr. Lawrence I. Barr, an osteopath; and an April 29, 1998 report from Dr. Leonard Strobel, an osteopath. Drs. Gleimer and Strobel maintained that appellant was totally disabled and was unable to perform any active function. Dr. Corda stated that the question of whether appellant could return to work was based on whether his pain could be

³ There is no indication in the record that the list of prospective duties were ever formally offered to and accepted by appellant.

⁴ Appellant additionally submitted duplicate copies of reports previously considered by the Office and which resulted in the determination of a conflict.

controlled. He additionally indicated that appellant had probable reflex sympathetic dystrophy to the left lower extremity. Medical reports concerning appellant's nonwork-related motor vehicle accident of May 19, 1993 were also submitted. However, no discussion was provided regarding whether appellant could return to work.

In a letter dated September 15, 1998, the Office requested a supplemental report from Dr. Askin advising whether the reflex sympathetic dystrophy was present at the time of his examination and whether the condition was causally related to the work injury. Dr. Askin was additionally asked whether the use of the wheelchair was related to the work injury and whether appellant could return to his date-of-injury position as a public works superintendent.

In a report of September 28, 1998, Dr. Askin advised that reflex sympathetic dystrophy was not present on appellant's June 24, 1997 examination. He opined that if such a process had developed in appellant, there would be no nexus to the March 14, 1995 work injury. Regarding wheelchair consideration, Dr. Askin opined that this was not necessary as he believed there to be an element of exaggeration or fakery in appellant's presentation. He reiterated his earlier opinion that appellant could work in any capacity performed prior to March 14, 1995 on a full-time basis without any injury-related restrictions.

In situations when there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist of the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁵

In this case, Dr. Askin's reports were based on a proper factual background as provided in the statement of accepted facts. He opined that, although appellant had residuals of his work-related injury, appellant could return to work in any capacity performed prior to March 14, 1995 on a full-time basis without any injury-related restrictions. Dr. Askin rationalized that he believed there to be an element of exaggeration or fakery in appellant's presentation and set forth his examination findings which clearly delineated the areas in which he thought appellant was in voluntary control of his presentation and were largely responsible for appellant's own "inability" to return to work. Although Drs. Gleimer and Strobel maintained that appellant was totally disabled and was unable to perform any active function, their reports are of little probative value as no rationale was provided.⁶ Dr. Corda advised that appellant could return to work if his pain was controlled. This report is of limited probative value as Dr. Corda did not provide an opinion that appellant's continued disability was due to the accepted employment conditions. The Board notes that the condition of reflex sympathetic dystrophy has not been accepted by the Office as related to the March 14, 1995 work injury. Based on Dr. Askin's probative, well-rationalized opinion that appellant could return, without restrictions, to the duties he was performing as a public works supervisor prior to his March 14, 1995 work injury, the Office properly found that Dr. Askin's opinion represented the weight of the medical evidence in terminating wage-loss benefits.

⁵ *Rosie E. Garner*, 48 ECAB 220, 225 (1996).

⁶ *Ceferino L. Gonzales*, 32 ECAB 1591 (1981).

Following the Office's termination of compensation, the burden to establish entitlement to compensation shifted to appellant. Causal relationship must be established by rationalized medical opinion evidence. Appellant submitted, as requested by the Office hearing representative, a copy of the medical records related to his nonwork-related automobile accident which predated the work injury. Accordingly, there is no reasoned medical evidence addressing and explaining why appellant's current claimed conditions and disability were caused by his original, accepted conditions and how it relates to appellant's inability to return to work in his prior capacity before his March 14, 1995 work injury. Thus, appellant has not met his burden of proof in establishing that the residuals he continues to suffer as a result of his employment-related conditions prevents him from returning to full-time employment as Dr. Askin's had opined. The Board, therefore, affirms the March 2, 2000 decision of the hearing representative affirming the January 20, 1999 decision terminating wage-loss benefits.

The March 2, 2000 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
March 27, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member