

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JERRY EASTERWOOD and DEPARTMENT OF THE NAVY,  
PUBLIC WORKS CENTER, Great Lakes, IL

*Docket No. 00-2141; Submitted on the Record;  
Issued March 1, 2002*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective April 27, 2000 on the basis that he no longer had residuals of his December 9, 1983 and December 30, 1985 employment injuries.

The Office accepted that appellant sustained a herniated disc at L4-5, a low back strain and a right ankle strain in employment injuries sustained on December 9, 1983 and December 30, 1985. He last worked for the employing establishment on November 18, 1986 and the Office paid compensation for temporary total disability. The employing establishment terminated appellant's employment effective April 30, 1988 on the basis that he was physically unable to perform the duties of his position of warehouse worker.

On July 24, 1996 the Office referred appellant to Dr. Stuart M. Meyer, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated August 29, 1996, Dr. Meyer diagnosed chronic low back strain with no evidence of a neurologic deficit. He concluded, "I find nothing orthopedically wrong with [appellant] that would keep him from performing some type of gainful employment. He should limit certain repetitive motions involving the back and not do repetitive heavy lifting."

On November 6, 1996 the employing establishment offered appellant a position as a limited-duty clerk and on November 20, 1996 the Office notified appellant that it had found this position suitable. In response, appellant stated that the offer was not consistent with the restrictions set forth by Dr. Meyer or by his attending Board-certified orthopedic surgeon, Dr. Gerald S. Kane. A July 16, 1996 report from Dr. Kane stated that appellant was not able to work at work, as he was "completely disabled and will remain that way with his problem on a permanent basis."

On January 6, 1997 the Office referred appellant, the case record and a statement of accepted facts to Dr. Julian Joffe, a Board-certified orthopedic surgeon, to resolve the conflict of

medical opinion on appellant's continuing disability for work. In a report dated January 22, 1997, Dr. Joffe concluded:

“At this time, I am in complete agreement with the recommendations that were made by Dr. Meyer. I cannot find anything orthopedically that would prevent [appellant] from performing a more or less sedentary type of job. I feel he can easily lift ten pounds and can work sitting at a desk, occasionally getting up to distribute materials and walking about an office. I feel [appellant] could perform these duties for eight hours per day without difficulty. I have reviewed the job description for a clerk at the Navy Public Work Center and feel that [he] could physically perform these duties without difficulty. It is amazing to me that [appellant] has been able to remain on disability with strictly subjective complaints and no objective backup for such a prolonged period of time.”

On June 27, 1997 the employing establishment again offered the limited-duty clerk position to appellant, who submitted an August 27, 1997 report from Dr. Kane in support of his contention that he could not perform the position. Dr. Kane stated that appellant was under treatment for a chronic herniated lumbar disc and a cervical spine condition and that he was “completely disabled from performing any type of work as he cannot sit or stand for any period of time, has difficulty traveling and still requires constant medication for pain relief.”

On October 29, 1997 the Office referred appellant to Dr. Dixon F. Spivy, a Board-certified psychiatrist, for an opinion whether he had psychological limitations related to his employment injuries. In a report dated November 20, 1997, Dr. Spivy diagnosed malingering and stated, “No work[-]related psychological condition exists other than his conscious desire to not work and to receive compensation.”

On May 29, 1998 the employing establishment again offered appellant the position of limited-duty clerk and on July 15, 1998 the Office advised appellant that it had found this position suitable. Appellant submitted a July 24, 1998 report from Dr. Kane diagnosing degenerative disc disease and spinal stenosis of the lumbar spine and cervical strain. Dr. Kane stated that appellant's complaints and neurologic abnormalities precluded him from returning to gainful employment.

The Office determined that further medical information was needed to determine whether appellant's nonwork-related condition of the cervical spine precluded him from performing the job offered by the employing establishment.

On September 9, 1998 the Office referred appellant to Dr. Richard H. Sidell, a Board-certified orthopedic surgeon, for a second opinion whether appellant had residuals of his employment injuries and whether appellant could perform the position offered by the employing establishment in light of his employment-related and nonwork-related conditions. In a report dated September 29, 1998, Dr. Sidell concluded:

“[Appellant] demonstrates extreme behavior abnormalities and unexplainable physical findings. He demonstrates 5 positive Waddell signs including positive

tenderness sign, positive simulation sign, positive subjection sign, positive regional sign and positive overreaction sign.

“Based on my physical assessment and testing, I do not feel that there is significant objective medical findings present to support continuing residuals from any injury date of December 9, 1983 or December 30, 1985. This is based on the lack of significant objective findings, the normal repeated CT [computerized tomography] scans, myelograms and (MRI) [magnetic resonance imaging] scans and the 5 positive Waddell signs.

“My examination supports that a cervical condition is present based on subjective complaints of pain, but no reproducible or believable objective findings.”

On November 10, 1998 the Office referred appellant, a statement of accepted facts and the case record to Dr. Richard Geline, a Board-certified orthopedic surgeon, to resolve the conflict of medical opinion between Dr. Sidell and Dr. Kane on whether appellant had residuals of his employment injuries. In a report dated January 27, 1999, Dr. Geline set forth appellant’s history, complaints and findings on physical examination and reviewed prior medical reports and diagnostic tests. Dr. Geline diagnosed chronic low back syndrome and degenerative disease of the cervical spine and stated:

“1. There are no current objective medical findings which support continual or residuals from the incident of December 1983 and December 1985. The current physical findings, in fact, suggest a volitional component.

“2. There are no current physical findings referable to the right ankle suggesting residual of an injury in December 1985.

“3. The current examination supports presence of a cervical condition. The objective finding noted is on the radiographic examination and not in the physical examination.

“4. With regard to work capability, considering the history of low back injury as described, I believe [appellant] could be considered to have recovered from the low back injury three months following the incident which would be in early 1986. Accordingly the work[-]related incidents do not preclude carrying out the tasks required for a limited[-]duty clerical position as described in the statement of accepted facts.

“5. At present, I believe there are no injury[-]related residuals which prevent [appellant] from returning to work as a warehouse worker.”

On March 22, 2000 the Office issued a notice of proposed termination of compensation on the basis that his employment-related conditions had resolved. Appellant submitted an April 18, 2000 report from Dr. Kane, who stated:

“Having followed [appellant] this period of time he was not felt to be a malingerer, had physical findings consistent with the degenerative disc in lumbar

spine with a certain degree of foraminal stenosis and in my medical opinion was completely disabled from returning to his work since he could not be up for any significant period of time without getting more muscle spasm, could not sit for any significant period of time since this caused more pain in the lower back as it does in most patients with lower back problems and was continually on medication. It was not felt that he could function satisfactorily to partake in an occupation even though sedentary.

“I must disagree with the other specialists since I found [appellant’s] examination consistent over this many years, not on an isolated basis of one examination.”

By decision dated April 27, 2000, the Office terminated appellant’s compensation on the basis that he had no residuals of his employment injuries.

The Board finds that the Office properly terminated appellant’s compensation effective April 27, 2000 on the basis that he no longer had residuals of his December 9, 1983 and December 30, 1985 employment injuries.

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 without establishing that the disability has ceased or that it is no longer related to the employment.<sup>1</sup>

There was a conflict of medical opinion between appellant’s attending physician, Dr. Kane, and the Office’s referral physician, Dr. Sidell, on whether appellant continued to have residuals of his December 9, 1983 and December 30, 1985 employment injuries. To resolve this conflict of medical opinion, the Office, pursuant to section 8123(a) of the Act,<sup>2</sup> referred appellant, the case record and a statement of accepted facts to Dr. Geline, a Board-certified orthopedic surgeon. In a report dated January 27, 1999, Dr. Geline concluded that appellant had no residuals of his December 1983 and December 1985 employment injuries, including the December 30, 1985 injury to his right ankle.

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.<sup>3</sup> Dr. Geline’s January 27, 1999 report was based on an accurate history and contains sufficient rationale to be afforded special weight and to establish that appellant has no residuals of his employment injuries. The April 18, 2000 report

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<sup>1</sup> *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

<sup>2</sup> 5 U.S.C. § 8123(a) states in pertinent part “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.”

<sup>3</sup> *James P. Roberts*, 31 ECAB 1010 (1980).

from Dr. Kane that appellant submitted in response to the Office's notice of proposed termination of compensation is essentially reiterative of that doctor's prior reports and as the report of a physician on one side of the conflict of medical opinion resolved by Dr. Geline is insufficient to overcome the weight of Dr. Geline's report or to create a new conflict with it.<sup>4</sup>

The April 27, 2000 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC  
March 1, 2002

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>4</sup> *Dorothy Sidwell*, 41 ECAB 857 (1990).