

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRANK P. HOWARD and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Los Angeles, CA

*Docket No. 01-579; Submitted on the Record;
Issued March 12, 2002*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation, effective October 7, 2000, on the grounds that he had no disability after that date due to his December 29, 1998 employment injury.

Under the Federal Employees' Compensation Act,¹ once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.² The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.³ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁴

In this case, the Office accepted appellant's December 29, 1998 lumbosacral and cervical strain injuries.

In a January 31, 2000 statement of accepted facts, the Office noted that it accepted appellant's December 29, 1998 lumbosacral and cervical strains as work-related injuries, that appellant returned to work on March 15, 1999 for one day and has not returned since March 26, 1999. The Office further noted that appellant's position was that of a payroll clerk

¹ 5 U.S.C. §§ 8101-8193.

² *Mary A. Moultry*, 48 ECAB 566 (1997).

³ *Id.*

⁴ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

that could be performed by sitting primarily and by some standing and walking and that appellant would also be required to carry light objects and to drive on an occasional basis.⁵

In a medical report dated December 2, 1999, Dr. H. Harlan Bleecker, a second opinion physician and a Board-certified orthopedic surgeon, stated that he had examined appellant on November 30, 1999, was familiar with appellant's history of injury and the statement of accepted facts. Dr. Bleecker found that appellant's work-related injuries caused residual symptoms consisting of low back pain, limited range of motion of the lumbar spine and tenderness of the lumbosacral area. He further noted that appellant could not work at his date-of-injury job but that he could work in a position that did not require pushing, pulling, lifting of greater than 10 pounds and no reaching above the shoulder.

In a medical report dated August 17, 1999, Dr. William Simpson, appellant's orthopedic surgeon, stated that he had treated appellant since April 6, 1999 for work-related injuries to his neck, upper and lower back and headaches. On that date Dr. Simpson stated that appellant had spasms and tenderness around the cervical spine, decreased tenderness around the upper extremities, bilateral shoulder impingement and trapezius tenderness, lumbar spasms and decreased motion about the lower back. He determined that appellant "should continue with temporary total disability until further disposition."

On February 9, 2000 the Office referred appellant to Dr. Anthony T. Fenison, a Board-certified orthopedic surgeon, to resolve the conflict in medical opinion between Dr. Simpson, who found that appellant was totally disabled and Dr. Bleecker, who found that appellant could return to restricted duty.

In a medical report dated February 28, 2000, Dr. Fenison noted a familiarity with appellant's history of injury and reviewed and summarized all of the relevant medical reports. Upon examination, he noted that appellant had full cervical range of motion, full extension, lateral rotation and full bending of the lumbar spine, had balanced reflexes, negative Babinski's reflexes and negative clonus. Appellant's neurological examination revealed hypoactive reflexes but Dr. Fenison noted that they were symmetrical at the patella and Achilles heel. He noted a negative straight leg test and a negative check for carpal tunnel abnormality. Upon review of appellant's magnetic resonance imaging (MRI) scans, Dr. Fenison noted degenerative disc disease at C3-4 and C5-6 levels. In the discussion section of his report, Dr. Fenison stated that appellant's "subjective complaints do not correlate with his objective findings. The patient has symptom magnification. There is nothing to suggest that this patient requires him to be temporarily totally disabled or that the patient's condition would not be improving." He noted that appellant was not a reliable witness inasmuch as he demonstrated positive Waddell's sign. Since appellant was not improving, Dr. Fenison found that appellant had reached maximum medical improvement. He found that appellant could work an eight-hour workday with the following restrictions: no heavy lifting "in regards to his neck or lower back," no "upward gazing," and no lifting more than 25 pounds. Dr. Fenison also noted restrictions against working more than 7 hours without a 15-minute break, or sitting or standing for more than 4 hours without a 15-minute break.

⁵ Appellant's position description notes that the physical requirements required performing his tasks primarily while seated, with "walking, standing, carrying light objects and occasionally driving an automobile."

On August 31, 2000 the Office proposed termination of appellant's compensation benefits.

By decision dated October 2, 2000, the Office terminated appellant's compensation benefits effective October 7, 2000 on the grounds that he no longer had a residual medical condition related to his December 29, 1998 employment injuries.

On November 14, 2000 the Office received correspondence dated November 7, 2000, delivered *via* facsimile from the office of Senator Barbara Boxer requesting reconsideration of appellant's claim.

By decision dated November 15, 2000, the Office denied modification of appellant's request for reconsideration.

The Board finds that the Office properly terminated appellant's compensation benefits effective October 7, 2000.

To resolve the conflict in medical opinion between appellant's treating physician and the Office's second opinion physician, the Office referred appellant, pursuant to section 8123(a) of the Act, to Dr. Fenison, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on appellant's continuing employment-related disability.⁶ In situations where there exist 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 upon a proper factual background, must be given special weight.⁷ The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of the impartial medical specialist selected to resolve the conflict in the medical opinion. The February 28, 2000 report of Dr. Fenison establishes that appellant had no disability on or after October 7, 2000, due to his December 29, 1998 employment injury.

Dr. Fenison detailed appellant's factual and medical history and reported his findings on examination including appellant's normal cervical and lumbosacral spine examinations, balanced reflexes and no objective evidence to support appellant's subjective complaints of pain. Dr. Fenison also noted degenerative disc disease at C3-4 and C5-6 levels as revealed by MRI scans, which were not attributed to his employment. He stated that appellant has symptom magnification and that he could work an eight-hour workday with restrictions.

⁶ Section 8123(a) of the Act provides 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." 5 U.S.C. § 8123(a).

⁷ *Mary A. Moultry, supra* note 2.

The Board has carefully reviewed the opinion of Dr. Fenison and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of this case. Dr. Fenison's opinion is based on a proper factual and medical history in that he reviewed an accurate and up-to-date statement of accepted facts and provided a thorough factual and medical history and accurately summarized the relevant medical evidence. Moreover, Dr. Fenison provided a proper analysis of the factual and medical history and the findings on examination, including the results of diagnostic testing and reached conclusions regarding appellant's condition which comported with this analysis.⁸ He provided medical rationale for his opinion by explaining that there was no objective evidence to support a medical residual condition based on appellant's December 29, 1998 employment injury.

The November 15 and October 2, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
March 12, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

⁸ *Bertha J. Soule*, 48 ECAB 314 (1997); *Naomi Lilly*, 10 ECAB 560, 573 (1957).