U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MALLILIEU MYERS and DEPARTMENT OF THE NAVY, LONG BEACH NAVAL SHIPYARD, Long Beach, CA

Docket No. 00-2177; Submitted on the Record;
Issued May 10, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on March 28, 1999 on the basis that he no longer had residuals of his employment-related conditions.

Appellant, who was born on March 11, 1937, sustained numerous strains and contusions, the first on January 15, 1968, the last on March 7, 1980, in the performance of his duties as a rigger at Hunters Point Naval Shipyard, San Francisco, California and at the employing establishment listed above, where he transferred on July 5, 1973. Appellant last worked on February 12, 1982 and the Office began paying him compensation for temporary total disability on February 24, 1982.

On February 8, 1999 the Office issued a notice of proposed termination of compensation on the basis that appellant no longer had residuals of his accepted injuries.

By decision dated March 19, 1999, the Office terminated appellant's compensation on March 28, 1999 on the basis that he was no longer disabled and no longer required medical treatment for his accepted conditions.

Appellant requested a hearing, which was held before an Office hearing representative on August 3, 1999.

By decision dated October 1, 1999, an Office hearing representative found that the report of an impartial medical specialist, Dr. Ernest B. Miller, constituted the weight of the medical evidence and established that appellant no longer experienced residuals of his accepted injuries.

The Board finds that the evidence does not establish that the residuals of appellant's employment-related conditions ended by March 28, 1999.

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.[1]

A conflict of medical opinion was created on whether appellant continued to have residuals of his employment injuries. In a report dated December 18, 1996, Dr. Roscoe B. Martin, an attending physician, concluded that appellant's lumbar and cervical spine disc disease were related to his employment injuries. Dr. Martin stated that appellant sustained disc damage in these injuries and as a result had degenerative changes to his spine. Another attending physician, Dr. Munish Gupta, stated in an August 5, 1997 report that appellant's diagnoses were cervical spondylolysis and lumbar degenerative disc disease and that it appeared that his disability was at least partially work related. In a report dated November 13, 1996, Dr. Peter N. Sfakianos, to whom the Office referred appellant for a second opinion evaluation, concluded that none of appellant's conditions outside the cervical and lumbar spine were in any way related to his employment. With regard to appellant's spine, Dr. Sfakianos concluded:

> "Each sprain/strain could be expected to aggravate his preexisting degenerative disc disease in either the cervical, thoracic or lumbar spine for a period of time of no greater than two to four months. There is no evidence in the medical records of a material change having occurred in the cervical, thoracic or lumbar spine, which was associated with any of these industrial or nonindustrial sprains and strains that occurred over the years. The patient's medical records indicate a progression of his degenerative disc disease in both the cervical and lumbar spine with absolutely no indications that any of the injuries that he has sustained over the years has altered that progression in any material way."

To resolve this conflict of medical opinion, the Office referred appellant, the case record and a statement of accepted facts to Dr. Ernest B. Miller, a Board-certified orthopedic surgeon, on August 22, 1997.[2] In a report dated September 25, 1997, Dr. Miller noted that the Office's statement of accepted facts indicated that appellant's first accepted employment injury occurred on November 3, 1975. In response to the Office's questions, Dr. Miller stated that appellant had no residuals of his employment injuries, as the five injuries he sustained from November 3, 1975

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

[2] 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."

to March 7, 1980 were all contusions or back strains that had resolved with no residuals. In answer to the Office's question of whether a preexisting condition had been aggravated, he stated:

> "No aggravation has occurred. The accepted injuries and accepted diagnoses are all conditions which generally resolved within 6 [to] 12 months within the injury. It is noted that the physical examination today demonstrates no residual evidence of contusion sacrum, no residual evidence of left knee contusion, no residual evidence of contusion right leg and no residual evidence of back strain or low back strain."

Appellant submitted reports from Dr. E. Ralph Johnson, his new attending physician, including an August 24, 1998 report diagnosing degenerative joint disease of the shoulders and the lumbosacral spine.

On August 11, 1998 the Office requested Dr. Miller to submit a supplemental opinion on whether appellant had residuals of his employment injuries. The Office sent him an addendum to its statement of accepted facts; this addendum listed five additional injuries that were accepted by the Office: back strains sustained on January 15 and March 4, 1968 and February 18, 1971, a left shoulder strain sustained on April 12, 1971 and a low back strain sustained on October 27, 1978. The addendum also listed, as an accepted injury, "permanent aggravation, low back" with a date of injury of November 20, 1980.

In a report dated September 8, 1998, Dr. Miller stated:

> "It appears quite clear from my examination today, my prior examination and the current reports of Dr. Johnson, that all of the accepted injuries with respect to the lower back, left shoulder, sacrum, have resolved. … The November 20, 1980 permanent aggravation of low back strain has resolved with no residual evidence of lower back strain. My opinion is confirmed by the recent treatment record of Dr. Johnson, which indicates no diagnosis of low back strain or permanent aggravation of low back strain."

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.[3]

The Board finds that the reports of Dr. Miller were not based on a proper factual background and were not sufficiently rationalized to be entitled to special weight. Contrary to the requirements of the Office's procedure manual, the Office's statement of accepted facts provided to him in its initial referral on August 22, 1997 did not include appellant's accepted

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

condition of permanent aggravation of the degenerative changes in his lumbosacral spine.[4] Although the Office's addendum sent to Dr. Miller with its August 11, 1998 request for a supplemental report listed "permanent aggravation, low back" as an accepted condition, Dr. Miller, in his September 8, 1998 report, interpreted this as "permanent aggravation of low back strain."

Permanent aggravation of low back strain was not the condition accepted by the Office. On August 13, 1982 an Office medical adviser reviewed the report of Dr. S. Arthur Schwartz, an earlier impartial medical specialist report and noted: "Dr. Schwartz stated that the claimant has sustained a permanent aggravation of his low back condition because of his work injuries accumulating over a period of time. The anatomic structures permanently altered were the intervertebral disc space at L5-S1, causing him to develop permanent symptomatology in his low back." In a September 16, 1982 letter, the Office advised appellant that the report of the impartial medical specialist "establishes a permanent aggravation of back condition by your work injuries." This evidence shows that in 1982 the Office accepted a permanent aggravation of the degenerative changes in appellant's lumbosacral spine.

Whether appellant's employment injuries resulted in a permanent aggravation of the degenerative changes in his lumbosacral spine was an issue on which there was a conflict of medical opinion at the time of the Office's referrals to Dr. Miller. In addition to Dr. Schwartz, two of appellant's attending physicians, Drs. Martin and Gupta, attributed appellant's degenerative changes in his low back to his employment injuries and Dr. Sfakianos, an Office referral physician, stated that the employment injuries resulted in only temporary aggravations of his degenerative disc disease that resolved in two to four months.[5]

Dr. Miller did not provide sufficient rationale to resolve this conflict. In his initial report, Dr. Miller stated that no aggravation of a preexisting condition occurred, but he was unaware at that time of the number of injuries appellant sustained and of the acceptance of a permanent aggravation of degenerative changes in appellant's lumbosacral spine. Dr. Miller's supplemental report does not address the permanent aggravation of degenerative changes, as he interpreted the Office's statement that appellant sustained a "permanent aggravation, low back" as permanent aggravation of low back strain. As Dr. Miller's reports does not show that the accepted condition of permanent aggravation of degenerative changes of the lumbosacral spine resolved or

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statements of Accepted Facts*, Chapter 2.809.12 (June 1995) includes as an essential element that must be provided in a statement of accepted facts the accepted conditions.

[5] The reports of these same physicians also conflict on whether appellant's degenerative changes of the cervical spine are causally related to his employment injuries. Several Office letters state that the Office accepted permanent aggravation of the degenerative disease of his cervical spine. However, this "acceptance" appears to be an error, as the earliest of these letters, which is dated January 10, 1983, states that the acceptance of permanent aggravation of degenerative disease was based on the impartial medical specialist's report and that no other conditions were accepted. The impartial medical specialist to which this letter must refer is Dr. Schwartz, who stated that appellant's lumbar disc degeneration was related to his employment injuries but that his cervical disc degeneration was not related to employment injuries but rather was related to nonwork automobile accidents. In any event, any future decision by the Office terminating appellant's compensation must address whether his cervical disc degeneration is related to his employment injuries.

that it was incorrectly accepted, his reports are not sufficient to establish that appellant has no residuals of his employment injuries.

The October 1, 1999 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC
May 10, 2002

Alec J. Koromilas
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member