

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of KEITH SHARP and DEPARTMENT OF DEFENSE,  
DEFENSE CONTRACT AUDIT AGENCY, La Mirada, CA

*Docket No. 00-2459; Submitted on the Record;  
Issued May 2, 2002*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden to terminate appellant's compensation benefits causally related to his accepted employment injury; and (2) whether the Office abused its discretion by refusing to reopen appellant's case for further consideration of the merits of his claim under 5 U.S.C. § 8128(a).

On April 25, 1997 appellant, then a 51-year-old senior auditor, filed a notice of traumatic injury alleging that he injured his lower back on March 17, 1997 while in the restroom, when he closed the stall door while sitting in his wheelchair. Appellant's claim was accepted for lumbar strain. In a prior claim accepted by the Office, appellant filed a notice of occupational disease claiming that he developed degenerative disc disease due to factors of his federal employment beginning in August 1992. The Office accepted appellant's claim for temporary aggravation of preexisting degenerative disc disease.<sup>1</sup>

By decision dated November 13, 1997, the Office found that the weight of the medical evidence established that appellant no longer had residuals of the March 17, 1997 work injury and denied further compensation benefits. Upon appeal, the Branch of Hearings and Review remanded the case back to the Office for further medical development based upon new evidence submitted by appellant at an oral hearing.

By decision dated May 21, 1999, the Office denied further compensation benefits, finding that the weight of the medical evidence established that appellant no longer had any residuals related to his work injuries. By decision dated March 6, 2000, a hearing representative affirmed the Office's May 21, 1999 decision, finding that the weight of the medical evidence established that appellant's employment-related residuals had ceased. Appellant requested reconsideration and submitted additional medical evidence. By decision dated July 19, 2000, the

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<sup>1</sup> Appellant also filed a claim for recurrence beginning February 12, 1996, which was denied by the Office on May 3, 1996.

Office denied appellant's request for reconsideration, finding that the evidence submitted was repetitious in nature and insufficient to warrant merit review.

The Board finds that the Office properly terminated appellant's compensation benefits effective May 21, 1999.

Under the Federal Employees' Compensation Act,<sup>2</sup> once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>3</sup> The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to employment.<sup>4</sup> After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant.<sup>5</sup> In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that he or she had an employment-related disability, which continued after termination of compensation benefits.<sup>6</sup>

At the time of termination on May 21, 1999, the record consisted of reports from appellant's attending physicians Dr. Marshall Grossman, a Board-certified internist, Dr. Franklin Kozin, a Board-certified internist and Dr. Mitchell Cohen, a Board-certified orthopedic surgeon. Many of the reports diagnosed appellant with chronic lower back pain but did not address causal relationship between the back pain and his March 17, 1997 accepted employment injury. The Board will only discuss the medical reports that address causal relationship between appellant's lower back condition and his accepted employment injury and are current in relation to the date of termination.<sup>7</sup>

In a report dated April 25, 1997, Dr. Grossman stated:

“[Appellant] has a diagnosis of acute chronic back pain secondary to old injuries and a new injury as of March 17, 1997. He has degenerative disc disease of the lumbar spine secondary to osteoarthritis and other causes. He additionally has chronic lumbar muscle strain and myofascial pain.... At this time he is handicapped and partially disabled. I have recommended an additional four to six weeks of bed rest through the end of May to recover from his March 17, 1997 accident.”

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> *Charles E. Minniss*, 40 ECAB 708, 716 (1989).

<sup>4</sup> *Id.*

<sup>5</sup> *Virginia Davis-Banks*, 44 ECAB 389 (1993).

<sup>6</sup> *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

<sup>7</sup> The Board notes that the “accepted employment injury” is the March 17, 1997 traumatic injury accepted for lumbar strain, since the occupational disease injury from 1992 was only accepted for a temporary aggravation.

In a report dated June 10, 1997, Dr. Kozin stated:

“[Appellant] has been under my care for a number of months for chronic and acute lower back pain. [He] has been temporarily totally disabled since he experienced increasing pain secondary to an exacerbation of his chronic back pain that occurred in March 1997, when he attempted to return to work in the midst of several months of increased lower back pain. At this time, [he] will be unable to return to work until he completes a comprehensive treatment course.

“[Appellant] has degenerative disc disease based upon discograms obtained by an orthopedic surgeon recently. His lumbar spine pain is secondary to this problem and has been complicated with acute and chronic muscle strain in the lumbar spine and myofascial pain syndrome.... At this time, I believe [him] to be handicapped. He has been disabled and unable to work at the DCAA work site since October 1996 due to his medical condition and to the injuries noted above.”

In a second opinion report, Dr. J. Pierce Conaty, a Board-certified orthopedic surgeon, diagnosed appellant with low back pain at L3-4, L4-5 and L5-S1 and stated:

“[Appellant] has preexisting conditions at L3-4, L4-5 and L5-S1, which is documented by a 1997 discography. He sustained a temporary aggravation of his preexisting condition on May 25, 1993. In regard to his claim for October 27, 1996, I do not believe that his low back complaints are medically connected to his federal employment. His current condition is a result of the natural progression of his preexisting condition. According to the Statement of Accepted Facts, the patient has been on leave without pay since December 1996, but he continues to have the same level of pain absent any precipitating work factor.

“I believe that the core of [appellant’s] problem at this time is his ongoing detoxification....<sup>8</sup> The aggravation that [appellant] sustained was in 1992, which was temporary and ceased in 1993 after treatment and return to work.... There are no injury-related subjective complaints and objective findings. The objective findings on discography reveal a preexisting condition at L3-4, L4-5 and L5-S1, which has naturally progressed and is causing the patient’s back pain.”

In a report from another second opinion physician, Dr. Mark Borigini, a Board-certified internist, dated May 27, 1997, diagnosed appellant with chronic low back pain with positive findings on discography at L3-4, L4-5 and L5-S1 and stated:

“[Appellant] complains of back pain. On the basis of my evaluation, it is very difficult to elicit any objective findings.... There has been a recent discography in March 1997, which revealed positive findings at L3-4, L4-5 and L5-S1. These are findings not related to [appellant’s] federal employment and are preexisting. There had been an aggravation of his back condition in 1993; however, this was temporary and ceased after appropriate treatment and limited duties.”

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<sup>8</sup> The record indicates that appellant had been in a detoxification process as a result of his addiction to painkillers.

He continued:

“I believe that his back pain is a result of the ongoing process of his degenerative back condition as shown on discogram. [Appellant] has had a long history of chronic low back pain in the absence of a specific injury, or a precipitating event.”

Dr. Conaty also submitted a November 3, 1997 supplemental report, in which he stated:

“My opinion is that [appellant] had recovered from the soft tissue injury of March 17, 1997 and at the time of my examination, all the findings are attributed to the 14- to 15-year history of chronic back pain with repeated episodes of exacerbation. It should be reemphasized that at the time of my examination, I found no true objective findings and my review of the [magnetic resonance imaging scan] failed to demonstrate any significant findings.”

Drs. Grossman and Kozin both diagnosed appellant with chronic lower back pain and opined that his pain was secondary to his degenerative disc disease as well as the March 17, 1997 injury. Dr. Conaty, on the other hand, diagnosed appellant with low back pain but attributed it to the natural progression of a preexisting condition and to appellant’s detoxification. Dr. Borigini also opined that appellant’s continuing back pain was the result of the ongoing process of his degenerative back disease. The Office determined that there was a conflict in the medical evidence between appellant’s attending physicians and Drs. Conaty and Borigini and referred appellant for an impartial medical specialist.

In a report dated March 10, 1999, Dr. Jerry L. Morris, a Board-certified orthopedic surgeon, examined appellant and the medical evidence of record and diagnosed chronic lumbar degenerative disc disease and chronic low back pain. He stated:

“The cause of [appellant’s] current low back problems is due to the incident in 1992. The incident of March 17, 1997 caused a temporary increase in [his] low back symptoms requiring him to seek and receive medical treatment that resulted in a resolution of the increased symptoms that resulted in the March 17, 1997 incident.”

In a supplemental report dated May 3, 1999, Dr. Morris stated:

“The increase in [appellant’s] symptoms of pain on March 17, 1997, caused an increase in his back pain. There were no objective findings on physical examination that would support or deny [appellant’s] complaints of pain.... I do not believe that [he] continues to suffer the residuals of the incident of March 17, 1997. [His] current condition is the same as it was just prior to the March 17, 1997 incident.”

The Office properly found that Dr. Morris’s reports carried the weight of the medical evidence at the time of the May 21, 1999 termination as it was a report from an impartial medical specialist and was based on a complete history of factual and medical findings.

Where there exists a conflict of medical opinion and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion on such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.<sup>9</sup>

In a March 10, 1999 report, Dr. Morris stated that he reviewed the statement of accepted facts, questions for the physician, the medical conflict statement and the complete case record including all the medical evidence. Dr. Morris completed an examination of appellant and also discussed the extensive history of appellant's injuries. He also performed range of motion and neurological examinations of appellant. Based on information from the complete medical record and his examination findings, Dr. Morris opined that the March 17, 1997 incident caused a temporary increase in appellant's low back pain that had since then resolved. He also stated in his May 3, 1999 report that there were no objective findings upon physical examination that would support or deny appellant's complaints of pain. As Dr. Morris's reports were sufficiently rationalized and were based on a complete factual and medical background, it represented the weight of the medical evidence and established that appellant's work-related residuals had ceased.

The weight of the medical evidence at the time of termination was the well-rationalized report from Dr. Morris and the Office properly terminated appellant's compensation benefits effective May 21, 1999.

The Board finds, however, that the Office abused its discretion, in its July 19, 2000 decision, in refusing to reopen appellant's case for further merit review.

To require the Office to reopen a case for merit review, section 10.606 provides that a claimant may obtain review of the merits of his or her claim by written request to the Office identifying the decision and setting forth arguments or submitting evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.<sup>10</sup> When a claimant fails to meet at least one of the above standards, the Office will deny the application for review without reviewing the merits of the claim.<sup>11</sup>

In support of his April 18, 2000 request for reconsideration, appellant submitted a copy of the March 10, 1999 report from Dr. Morris, a copy of the May 3, 1999 supplemental report from Dr. Morris and a March 30, 2000 report from Dr. Jerald P. Waldman, a Board-certified orthopedic surgeon. The evidence from Dr. Morris is duplicate evidence and is of little probative value. The Board has found that the submission of evidence or legal argument, which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.<sup>12</sup>

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<sup>9</sup> *Jack R. Smith*, 41 ECAB 691, 701 (1990).

<sup>10</sup> 20 C.F.R. § 10.606(a). *See generally* 5 U.S.C. § 8128.

<sup>11</sup> 20 C.F.R. § 10.608(a).

<sup>12</sup> *Alton L. Vann*, 48 ECAB 259 (1996).

The Board finds, however, that the March 30, 2000 report from Dr. Waldman is new and relevant evidence and relates to the underlying issue in appellant's case, whether appellant had any continuing disability or residuals causally related to his accepted employment injury. Dr. Waldman's March 30, 2000 report contains medical opinion not previously considered by the Office. Dr. Waldman in his March 30, 2000 report, addresses appellant's continuing back problem as a result of his original 1992 injury and the work-related exacerbation in 1997. The Board finds that since Dr. Waldman's report addresses appellant's continuing disability and attributes it to his previous employment injuries, it constitutes relevant evidence. Consequently, the Office abused its discretion in denying further merit review.

The March 6, 2000 decision of the Office of Workers' Compensation Programs regarding the termination of compensation benefits is affirmed. The July 19, 2000 nonmerit decision is set aside and remanded for a merit review.

Dated, Washington, DC  
May 2, 2002

Colleen Duffy Kiko  
Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member