

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GREG G. VENABLE and DEPARTMENT OF THE NAVY,
NAVAL FACILITIES ENGINE COMMAND, San Diego, CA

*Docket No. 01-2247; Submitted on the Record;
Issued May 6, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits as of January 11, 2000.

On October 14, 1997 appellant, a 42-year-old masonry worker, injured his lower back when the vehicle in which he was a passenger was struck from behind by another vehicle. He filed a claim for benefits, which the Office accepted for lumbosacral sprain. Appellant returned to work in a modified position on October 27, 1997. The Office paid compensation for appropriate periods.

In a report dated June 3, 1998, Dr. James F. Marino, a Board-certified orthopedic surgeon, advised that the results of a magnetic resonance imaging (MRI) scan were consistent with degenerative disc changes and focal extrusion at two levels. Dr. Marino stated that appellant had been treated conservatively since his October 1997 work injury, but that he felt his condition had not improved and was, therefore, anxious to undergo more aggressive forms of treatment, including surgery.

In order to determine whether appellant's current condition was causally related to the October 14, 1997 employment injury and whether it was appropriate to authorize surgery to ameliorate this condition the Office referred appellant for a second opinion examination with Dr. Thomas R. Dorsey, a Board-certified orthopedic surgeon, on August 7, 1998.

In a report dated August 7, 1998, Dr. Dorsey advised that appellant's MRI scan findings showed some disc bulging at L4-5 on the right without nerve root compression and that there appeared to be some displacement of the left S1 nerve root at L5-S1. He stated:

“Overall, the findings on this patient's MRI [scan] are consistent with those findings which can be seen in patients with no back pain. This, taken in conjunction with his clinical examination showing no true evidence of radiculopathy, leads me to conclude that these findings were existent prior to the

events of October 14, 1997. I do not see any permanent mechanical exacerbation of his lumbar spine anatomy as result of the events of the motor vehicle accident.”

Dr. Dorsey indicated that surgery for a patient with appellant’s condition would not be helpful, as the results are unpredictable and relief is usually not obtained from surgery. He noted that appellant had no signs of radiculopathy, which was a condition more likely to be relieved through surgery. Dr. Dorsey stated that there were no quantifiable objective findings or residuals from any work-related condition and advised that appellant was currently employable in some capacity, with certain physical limitations. He felt that, at most, appellant had a lumbar musculoligamentous sprain/strain, which is now resolved.

By decision dated February 23, 1999, the Office denied appellant authorization for his proposed back surgery.

On March 8, 1999 the Office issued a notice of proposed termination of compensation to appellant. The Office found that the weight of the medical evidence, as represented by Dr. Dorsey’s referral opinion, established that all residuals from his employment-related disability had ceased and that his current condition was not causally related to the October 14, 1997 employment injury. The Office, therefore, found that all compensation and medical benefits should be terminated. The Office allowed appellant 30 days to submit additional evidence or legal argument in opposition to the proposed termination. Appellant did not respond to this notice within 30 days.

By decision dated April 8, 1999, the Office terminated appellant’s compensation.

By letter dated May 6, 1999, appellant’s attorney requested an oral hearing.

By decision dated August 10, 1999, an Office hearing representative, based on a review of the written record, set aside the April 8, 1999 Office decision terminating compensation, finding that there was a conflict in the medical evidence regarding whether appellant currently had residuals from his accepted October 14, 1997 employment injury. The hearing representative remanded the case to the district Office for referral to an independent medical specialist to resolve the conflict in medical evidence.

The Office scheduled an independent medical examination for appellant with Dr. Patrick M. O’Meara, a Board-certified orthopedic surgeon, for October 18, 1999.

In a report dated October 18, 1999, Dr. O’Meara, after stating findings on examination and reviewing the medical records and the statement of accepted facts, advised that appellant had an employment-related musculoskeletal sprain/strain, which had resolved. He opined that appellant should be considered permanent and stationary and should be released as cured in regard to his accepted injury, as he had no residual disability relating to that injury. Dr. O’Meara stated that two MRI’s appellant underwent showed small disc protrusions at L4-5 and L5-S1 without signs of disc herniation and suggested only chronic degenerative changes of the lumbar spine. He advised that, on clinical examination, appellant showed no signs of radiculopathy or sciatica secondary to nerve root impingement and indicated that no formal work restrictions were warranted based on his accepted injury.

On December 10, 1999 the Office issued a notice of proposed termination of compensation to appellant. The Office found that the weight of the medical evidence, as represented by Dr. O'Meara's referee opinion, established that all residuals from his employment-related disability had ceased and that his low back condition was not causally related to the October 14, 1997 employment injury. The Office, therefore, found that all compensation and medical benefits should be terminated. The Office allowed appellant 30 days to submit additional evidence or legal argument in opposition to the proposed termination. Appellant did not respond to this notice within 30 days.

By decision dated January 11, 2000, the Office terminated appellant's compensation.

By letter dated January 25, 2000, appellant's attorney requested an oral hearing, which was held on August 2, 2000.

Appellant submitted a January 21, 2000 report from Dr. Marino, who reiterated his previous finding that appellant had degenerative changes of the L4-5 and L5 discs and some spinal stenosis at the L4-5 level based on MRI scan results. Dr. Marino further stated that appellant has "more than trivial" back pain every morning which had not abated since his last evaluation in March 1999. He advised that appellant might be a candidate for lumbar fusion in the future.

By decision dated May 29, 2001, an Office hearing representative affirmed the January 11, 2000 Office decision.

The Board finds the Office met its burden of proof to terminate appellant's compensation benefits as of January 11, 2000.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.¹ 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.²

In this case, the Office based its decision to terminate appellant's compensation on the October 18, 1999 report of Dr. O'Meara, the independent medical examiner. In his referee medical opinion, Dr. O'Meara stated that appellant's work-related sprain/strain had resolved and that he had had no residual disability relating to that injury. He opined that appellant's clinical examination demonstrated no signs of radiculopathy or sciatica secondary to nerve root impingement and advised that he had formal work restrictions resulting from his accepted injury. The Office relied on Dr. O'Meara's opinion in its January 11, 2000 termination decision, finding that all residuals of the previously accepted condition had ceased and that appellant currently suffered from no condition or disability causally related to his October 14, 1997 accepted employment injury.

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

² *Id.*

The Board holds that the Office properly found that Dr. O'Meara's referee opinion negating a causal relationship between appellant's claimed current conditions and disability and his October 14, 1997 employment injury and that he no longer had any residuals from the employment injury was sufficiently probative, rationalized and based upon a proper factual background and that, therefore, the Office acted correctly in according Dr. O'Meara's opinion the special weight of an independent medical examiner.³ Accordingly, the Board finds that Dr. O'Meara's opinion constituted sufficient medical rationale to support the Office's January 11, 2000 decision, terminating appellant's compensation.

Following the Office's termination of compensation, the burden of proof in this case shifted to appellant, who requested an oral hearing and submitted Dr. Marino's January 21, 2000 report. This report, however, did not contain countervailing, probative medical evidence that appellant continued to have residual disability from his accepted October 14, 1997 injury. Dr. Marino, whose opinion represented one side of the conflict resolved by Dr. O'Meara's report, merely reiterated his impression of the MRI scan results and indicated that appellant might need fusion surgery at some point in the future. Thus, Dr. Marino's report did not satisfy appellant's burden of proof to submit medical evidence sufficient to override the Office's January 11, 2000 termination decision, which properly found that Dr. O'Meara's referee opinion constituted the weight of the medical evidence. Accordingly, the Board affirms the Office's May 29, 2001 decision, affirming the January 11, 2000 termination decision.

The May 29, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
May 6, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

³ Gary R. Seiber, 46 ECAB 215 (1994).