U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GARRY T. SKAGGS and DEPARTMENT OF THE ARMY
TRAINING & DOCTRINE COMMAND, Fort Knox, KY

Docket No. 02-1018; Submitted on the Record;
Issued November 7, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective October 8, 2000; and (2) whether the Office abused its discretion in denying a merit review.

On August 15, 1988 appellant, then a 43-year-old intermittent tractor operator, filed a notice of traumatic injury and claim for compensation (Form CA-1), alleging that he injured his back while operating a lawn mower over very rough terrain.

In a September 22, 1988 report, Dr. William Nash diagnosed appellant with a herniated disc at L5- S1, recommended conservative treatment and indicated that appellant could return to light duty on October 15, 1988.

Appellant was terminated from his employment on September 30, 1988 when his employment term expired.

Appellant returned to work on October 15, 1988 in the private sector as a welder.

On August 28, 1990 appellant filed a claim for recurrence of total disability alleging that he reinjured his back in December 1989.

Appellant had a lumbar laminectomy and discectomy on February 1, 1990.

The Office eventually accepted both his herniated discs and recurrence claims as work related.

In a May 6, 1991 report, Dr. John Dimar, a Board-certified orthopedic surgeon, diagnosed appellant with: (1) congenitally small spinal canal, most prominent L3-4, moderate

L4-5 severe, with facet hypertrophy and lateral recess stenosis, (2) status post L5-S1 laminectomy with discectomy and (3) mild to moderate bulging disc at L5-S1. He wrote:

> "[Appellant] presents a difficult challenge. He certainly has the early onset of degenerative changes within his spine and facet hypertrophy found that with a very small spinal canal. This undoubtedly has caused [appellant] decreased spinal volume which has predisposed him to his radicular symptoms which appear to be recurring again. We feel he will have recurring problems with his back in the future, particularly as increased arthritis, dis[c] collapse and facet hypertrophy and lateral recess stenosis.

In a May 31, 1991 report, Dr. Stanley Collis noted that appellant continues to have pain in his right lower extremity which he felt was related to the 1988 injury. He added that though appellant had not worked since the surgery he could perform restricted light-duty work.

In a May 18, 1993 progress note, Dr. Dimar indicated that appellant's fusion remained solid but, he was not ready to return to work.

Appellant continued to receive compensation for total temporary disability.

In a June 27, 2000 letter, the Office referred appellant for a second opinion.

In a July 10, 2000 report, Dr. Robert Keisler diagnosed appellant with: (1) multiple level spinal stenosis (L3 to S1) with facet arthrosis, history of secondary radiculopathy; (2) status post laminectomy, later wide decompression and spine fusion (L4 to S1) possibly failed; (3) persistent secondary sensory radiculopathy; (4) status post right hip fracture, secondary moderate degenerate join disease of right hip. He further wrote:

> "The available record suggests that [appellant] has multiple level spinal stenosis and secondary facet arthrosis that apparently produced symptoms with radicular symptoms in 1988 for the first time. There is not a history of an injury or an event that would produce an injury to the spine, though activities in a seated position often produce symptoms in an underlying pathological condition. Even though the objective examination is normal, it is clear there was spinal stenosis addressed with a several surgical procedures, which perhaps have resulted in some protection form additional symptoms, though the initial radicular component appears to be remaining (though not provable).
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> "It should be noted that the SOAF indicates a 'herniated dis[c]' whereas in fact the subsequent events clearly indicate that this is a spinal stenosis of a developmental and degenerative nature. Although exacerbation of symptoms may be related to a specific activity or position, this may not be a factor causing the condition. Spinal stenosis and foraminal stenosis are significant disorders that produce radicular symptoms. Surgery may have been beneficial to temporarily diminish some of the symptoms, but this is often temporary and does not address the underlying pathology.

"The current condition would not be a continuation of symptoms that were addressed in 1988, but for a condition that was preexisting for many years before. The diagnosis of dis[c] herniation is incorrect as proven by the subsequent events. The event in 1988 would be a temporary exacerbation of symptoms in an underlying progressive disorder.

"The subjective complaints are compatible with chronic radiculopathy secondary to spinal stenosis. The established diagnosis, spinal and foraminal stenosis with radiculopathy, would not be related to a work or other injury.

"There are continued symptoms, but not in relationship to a work or other injury. The possibility of an exacerbation of symptoms from a preexisting condition may be related and would have resolved following the treatment in 1988 or 1990. Any residual symptoms or findings would be the result of the preexisting condition expected to occur with or without injuries.

"I do not find work[-]related injury residuals at this time…. Functional capacity is reduced by the spinal stenoisis and surgical procedures that may have failed."

In an August 25, 2000 letter, the Office proposed terminating appellant's compensation finding the weight of the medical evidence with Dr. Keisler.

In a September 5, 2000 report, Dr. Dimar wrote "that after a two level fusion [appellant] could not be expected to go back and lift 100 pounds. He needs a sedentary type job, 15 to 20 pounds maximum, avoid repetitive lifting, twisting or long periods of sitting or standing…."

In an October 4, 2000 decision, the Office finalized the proposed termination.

In an October 19, 2000 letter, appellant requested a hearing before the Branch of Hearings and Review.

In a November 28, 2000 report, Dr. Dimar criticized Dr. Keisler's report writing that he found it "very incredulous that a physician doing an IME [impartial medical examination] could go back 12 years and make any sort of remote surgical judgment concerning a patient's care, the outcome of surgical repair and return to work status…." He concluded that appellant's condition had not changed.

In a March 6, 2001 report, Dr. S. Pearson Auerbach, a Board-certified orthpedic surgeon, diagnosed a herniated disc at L5-S1. He further indicated that appellant's condition was not due to a dormant preexisting condition and that he could not return to work at his date-of-injury job.

In a July 27, 2001 decision, the hearing representative affirmed the termination finding the weight of the medical evidence with Dr. Keisler.

In a September 1, 2001 decision, appellant requested reconsideration and submitted a personal letter arguing against terminating his compensation.

In a November 27, 2001 decision, the Office denied reconsideration.

The Board finds that there is a conflict in the medical evidence between the second opinion physician, Dr. Keisler and appellant's physicians, Drs. Auerbach and Dimar regarding whether appellant had continuing disability related to his accepted conditions.[1]

In his September 5, 2000 report, Dr. Dimar found that appellant could not return to his date-of-injury job. Instead, he wrote that appellant needed a sedentary job, avoid lifting, twisting and long periods of standing or sitting.

Dr. Auerbach also found that appellant had ongoing restrictions related to accepted herniated disc and recurrence claims. He specifically stated that he did not feel appellant's current conditions were related to his underlying spinal stenosis. While Dr. Auerbach did not provide sufficient rationale for his opinion he was very clear that he believed appellant's condition was related to his accepted injuries.

Dr. Keisler found the opposite, that appellant's accepted condition had resolved and his continuing pain and symptoms were due to his preexisiting underlying conditions.

The Board finds that, since the Office relied on the report of Dr. Keisler to terminate appellant's compensation benefits effective October 8, 2000 without having resolved the existing conflict, the Office has failed to meet its burden of proof in terminating appellant's benefits.[2] Based on this finding, the second issue in this case is moot.

[1] Section 8123(a) of the Federal Employees' Compensation 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). When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence. *William C. Bush*, 40 ECAB 1064, 1975 (1989).

[2] *See Gail D. Painton*, 41 ECAB 492, 498 (1990); *Craig M. Crenshaw, Jr.*, 40 ECAB 919, 922-23 (1989).

The July 27, 2001 decision by the Office of Workers' Compensation Programs is reversed.

Dated, Washington, DC
November 7, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member