

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JAMES F. AUE and DEPARTMENT OF THE ARMY,  
SACRAMENTO ARMY DEPOT, Sacramento, CA

*Docket No. 02-1326; Submitted on the Record;  
Issued November 26, 2002*

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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 in terminating appellant's compensation.

Appellant's occupational disease claim filed on November 18, 1985 was accepted for low back pain secondary to a bulging disc at L4-5. The Office paid appropriate wage-loss compensation and referred appellant for vocational rehabilitation.<sup>1</sup> Later, the Office accepted a herniated nucleus pulposus (HNP) at L4-5.

The Office referred appellant to Dr. Thomas R. Gordon, a Board-certified neurologist, for a second opinion evaluation on October 23, 1997. His report, that appellant was able to work in a sedentary job for four hours a day, increasing to full time, was sent to appellant's treating physician, Dr. Ernest J. Meinhardt, a family practitioner. He agreed with Dr. Gordon's conclusion that disc herniation symptoms were expected to improve gradually over the course of months to a year, but stated that appellant's back condition had not significantly changed since the 1985 injury and that he remained disabled.

Dr. Meinhardt recommended a physical capacities evaluation, which concluded on January 29, 1999 that appellant had the ability to work full time in a sedentary to light-duty position with the proper work-hardening program. Dr. Meinhardt agreed with the evaluation and suggested that appellant be referred to a pain management specialist. The Office again referred appellant to vocational rehabilitation, but closed the file after the counselor concluded that retraining was not feasible.

On May 14, 1999 the Office referred appellant for another second opinion evaluation to Drs. William Furrer, Jr. and Edward P. Hoffman, Board-certified in orthopedic surgery and

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<sup>1</sup> Appellant was terminated from his federal employment on May 2, 1989.

neurosurgery, respectively. On July 20, 1999 the Office again referred appellant to vocational rehabilitation and participation in a work-hardening program.

Because of a conflict in the medical opinion evidence between the referral physicians, Drs. Furrer and Hoffman and appellant's treating physicians, Drs. Meinhardt and Craig N. Pfeiffer, a Board-certified neurosurgeon, over appellant's ability to work, the Office selected two impartial medical examiners to resolve the issue.<sup>2</sup>

Based on the October 15, 1999 report of Drs. Richard E. Marks and Dean S. Ricketts, Board certified in neurology and orthopedic surgery, respectively, the Office issued a notice of proposed termination of compensation on October 28, 1999. Appellant disagreed and submitted a November 22, 1999 report from Dr. Pfeiffer, who stated that a November 12, 1999 magnetic resonance imaging (MRI) scan showed significant degenerative disc disease at L4-5 and L5-S1. He opined that appellant was not capable, even on a good day, of more than three hours work and was permanently disabled from gainful employment.

On December 8, 1999 the Office terminated appellant's wage-loss compensation and medical benefits on the grounds that the medical evidence established that appellant was no longer disabled due to the accepted work injury.

Appellant requested a hearing, which was held on June 22, 2000. Following the hearing, appellant submitted a June 30, 2000 report from Dr. Michael M. Bronshvag, Board certified in neurology and internal medicine. By decision dated September 18, 2000, the hearing representative found that the weight of the medical evidence rested with the report of the impartial medical examiners that appellant had no further disability for work due to the accepted injury. However, the hearing representative determined that appellant was still entitled to medical benefits for his back condition.

Appellant requested reconsideration and submitted an October 20, 2000 report from Dr. Bronshvag, who disagreed with the conclusions of Drs. Ricketts and Marks, but stated that appellant was "capable of full-time work of a light nature (no significant amounts of lifting required)."

By decision dated January 25, 2001, the Office denied appellant's request on the grounds that the evidence submitted was repetitive and, therefore, insufficient to warrant a merit review. Appellant again requested reconsideration and submitted a March 30, 2001 report from Dr. Donald G. Paish, Jr., Board certified in orthopedic surgery.

On June 15, 2001 the Office denied modification of its prior decision on the grounds that Dr. Paish's report was not well rationalized. By letter dated August 14, 2001, the Office informed appellant that the June 15, 2001 decision was inappropriate because the claims examiner had previously issued the initial termination notice. On August 23, 2001 a different

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<sup>2</sup> U.S.C. § 8123(a) states in pertinent part: "If there is a 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."

claims examiner reviewed the case and found that the weight of the medical evidence remained with the impartial medical examiners because Dr. Paish failed to explain his contrary opinions.

By letter dated August 24, 2001, appellant requested reconsideration based on the August 17, 2001 report of Dr. John W. Lamb, a Board-certified orthopedic surgeon. On February 22, 2002 the Office denied modification of its prior decision on the grounds that Dr. Lamb failed to describe or explain how the findings of the impartial medical examiners were insufficient.

The Board finds that the Office met its burden of proof in terminating appellant's compensation.

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.<sup>3</sup> Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.<sup>4</sup>

In situations where opposing medical opinions on an issue are of virtually equal evidentiary weight and rationale, the case shall be referred for an impartial medical examination to resolve the conflict in medical opinion.<sup>5</sup> The opinion of the specialist properly chosen to resolve the conflict must be given special weight if it is sufficiently well rationalized and based on a proper factual background.<sup>6</sup>

In this case, the Office properly determined that a conflict of medical opinion existed over whether appellant had the capability to return to light-duty work. Appellant's treating physicians<sup>7</sup> concluded that he was not capable of any gainful employment due to pain caused by his lumbar degenerative disc disease and that rehabilitation was not feasible. The second opinion examiners found that appellant's back condition was fixed and stable and that he could handle a light- to medium-duty position. Therefore, the Office referred appellant to Drs. Ricketts and Marks to resolve whether appellant was currently disabled from his work-related injury and, if so, the level of disability.

In their October 15, 1999 report, Drs. Ricketts and Marks reviewed appellant's "extensive" medical history and a statement of accepted facts provided by the Office, which included the physical requirements of his date-of-injury job. The physicians discussed the diagnostic testing of appellant's back, noting that a computerized tomography (CT) scan dated

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<sup>3</sup> *Betty Regan*, 49 ECAB 496, 501 (1998).

<sup>4</sup> *Raymond C. Beyer*, 50 ECAB 164, 168 (1998).

<sup>5</sup> *Richard L. Rhodes*, 50 ECAB 259, 263 (1999).

<sup>6</sup> *Sherry A. Hunt*, 49 ECAB 467, 471 (1998).

<sup>7</sup> Appellant saw the two physicians because he lived in Alaska during the summers and on the west coast at other times.

March 12, 1985 showed central bulging of the L4-5 disc and degenerative changes at L4-5 and L5-S1. A lumbar myelogram on July 11, 1986 was consistent with a HNP at L4-5 and right nerve root compression. A March 16, 1990 CT scan showed no significant change from the 1985 study. Appellant had epidural steroid injections in late 1990. A MRI scan on October 24, 1997 showed disc desiccation at L4-5 with a broad-based bulge and annular tear.

The physicians noted the October 23, 1997 examination of Dr. Thomas R. Gordon, a Board-certified neurologist, who diagnosed “unusual pain syndrome” and commented that appellant was symptomatic with sciatica on the left, but the disc bulge was noted to be on the right at L4-5. Dr. Gordon noted a number of inconsistencies in physical examination. A physical capacity evaluation done on January 29, 1999 concluded that “with proper training and motivation [appellant] should be able to function in a light-duty range of physical capacities at work.”

The physicians reviewed Dr. Meinhardt’s treatment notes and the June 14, 1999 report of Drs. Furrer and Hoffman, who noted considerable pain behavior with inconsistencies in clinical findings during their examination. They stated that appellant could pursue light to medium work on a reasonably continuous basis, although appellant had “an extremely severe illness conviction,” which would hamper his return to gainful employment. They noted that appellant’s herniated disc was on the right at the L4-5 level yet his symptoms were most prominent on the left. Dr. Furrer added in a July 13, 1999 letter that appellant had moderately heavy callus formation on his hands, which indicated a much greater level of activity than he described.

Finally, Drs. Marks and Ricketts considered the September 24, 1999 report of Dr. Timothy Hill, who diagnosed degenerative disc disease and a herniation at L4-5 without nerve root impingement and noted that his clinical findings were consistent with “significant symptom magnification.” He concluded that appellant could work full time in a sedentary to light physical capacity, but had been told by multiple physicians over the years that he was disabled. Dr. Hill added that appellant was “invested in invalidism” and had a “lot to lose by becoming more functional.”

Drs. Marks and Ricketts responded to the Office’s questions as follows:

“(1) They found no objective evidence of radiculopathy and stated that the disc herniation at L4-5 seen in the 1986 myelogram subsequently improved when compared with the 1997 MRI scan, which showed diffuse degenerative disease.

“(2) Appellant’s degenerative disc disease was not due to any work-related condition and had progressed naturally since the injury in 1985.

“(3) The physicians stated that appellant ‘currently considers himself to be totally disabled and unable to work in any position.’ However, little objective evidence corroborated appellant’s subjective complaints other than the degenerative disc disease at a number of levels without frank disc herniation.

“(4) The degenerative disc disease is the cause of some of appellant’s lumbosacral pain. However, absent objective neurological or orthopedic findings and

considering the nonphysiologic findings on examination, the degenerative changes are not severe enough to render appellant incapable of work.

“(5) Appellant’s significant pain behavior, the nonphysiologic findings and positive Waddell’s signs suggest ‘a significant nonphysiologic/functional component’ to appellant’s pain complaints.

“(6) Appellant is unable to work as a mechanic but is capable of working full time on a reasonably continuous basis in a light or medium position, which did not require repetitive bending or lifting more than 50 pounds. Appellant is also able to participate in a work-hardening program and vocational rehabilitation.”

Drs. Marks and Ricketts reviewed the extensive case record and many reports on appellant’s medical treatment since the 1986 injuries. They examined appellant thoroughly, discussed the diagnostic testing, explained their clinical findings and provided medical rationale for their conclusion that appellant’s work-related herniated disc had resolved. Thus, these physicians provided an opinion that was sufficiently well rationalized to support their conclusion that appellant was capable of returning to work in a light- to medium-duty position. The Board finds that their report is entitled to the special probative weight accorded to impartial medical examiners and establishes that appellant’s accepted work injuries had resolved.<sup>8</sup>

On reconsideration appellant submitted Dr. Bronshvag’s October 20, 2000 commentary on the report of Drs. Marks and Ricketts. Dr. Bronshvag disagreed with the medical rationale provided by the impartial medical examiners but noted that appellant described “a level of difficulty and disability in excess of what the facts demonstrate” and was capable of full-time work of a light nature. Inasmuch as these conclusions are similar to those reached by Drs. Marks and Ricketts, the Board finds that the Office properly denied reconsideration.

Subsequently, appellant submitted a March 30, 2001 report from Dr. Paish, who reviewed the extensive medical history and diagnostic test results. He stated that appellant was still disabled by the initial work injury and continued to be unemployable. Dr. Paish concluded: “[Appellant’s] disability is solely from his employment which is now impossible by virtue of his injury.” He agreed with Dr. Bronshvag, who stated that appellant could not return to his previous work as a mechanic.

While Dr. Paish found appellant to be disabled for his previous employment, he failed to address whether appellant was capable of sedentary, light-duty work. Further, he did not examine appellant but only reviewed his medical records. Finally, Dr. Paish provided no medical rationale for his conclusion that appellant’s degenerative disc disease resulted from the initial work injury. For these reasons, the Board finds that his report lacks sufficient probative value to create a conflict with the well-reasoned opinion of Drs. Marks and Ricketts.<sup>9</sup>

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<sup>8</sup> See *Richard L. Rhodes*, 50 ECAB 259, 263 (1999) (finding that the impartial medical examiner’s opinion that appellant’s hysterical conversion disorder had resolved was sufficiently well rationalized to merit special weight).

<sup>9</sup> See *Earl David Seal* 49 ECAB 152, 155 (1997) (finding that medical opinions based on appellant’s beliefs that his injury was work related lacked probative value in meeting appellant’s burden of proof).

Appellant submitted the August 17, 2001 report of Dr. Lamb in support of his request for reconsideration. He reviewed all the records and agreed that appellant was not permanently and totally disabled but rather was capable of a light to moderate activity level on a full-time basis. Dr. Lamb completed a work-capacity evaluation listing limitations on sitting and standing for four hours and lifting more than 25 pounds and recommended that appellant start at four hours a day increasing to full time as he regained functional status. The Board finds that Dr. Lamb's report supports the conclusions of the impartial medical examiners. Therefore, the Office properly denied modification of its prior decision.<sup>10</sup>

The February 22, 2002 and August 17, 2001 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC  
November 26, 2002

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>10</sup> See *Jimmie H. Duckett*, 52 ECAB \_\_\_\_ (Docket No. 99-1858, issued April 6, 2001) (opinion that appellant's back condition was due to the natural progression of his spondylitis was sufficiently rationalized to establish that his work-related back condition had resolved and to meet the Office's burden of proof in terminating compensation).