

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HUGH D. TOMES and TENNESSEE VALLEY AUTHORITY,
DIVISION OF MEDICAL SERVICES, Chattanooga, TN

*Docket No. 02-948; Submitted on the Record;
Issued October 15, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits effective October 10, 1999.

The Office accepted appellant's claim for a cervical strain resulting from a traumatic injury occurring on May 30, 1990. Appellant has not worked since the May 30, 1990 employment injury and received appropriate total disability benefits.

In a report dated February 28, 1992, Dr. S. Pearson Auerbach, a Board-certified orthopedic surgeon, considered appellant's history of injury, performed a physical examination, and reviewed x-rays, a magnetic resonance imaging (MRI) scan, and a myelogram which showed osteophytic spurring and degeneration at C5-6, and degenerative changes at C4-5 and C5-6. He stated that appellant had a huge bony exostosis in his left shoulder which he "suspected" was the result of an "injury appellant sustained many years ago" and caused loss of shoulder motion. Dr. Auerbach also stated that appellant was restricted in his cervical spine motion.

In a report dated September 2, 1997, the second opinion physician, Dr. M. Anwarul Quader, a Board-certified orthopedic surgeon, considered appellant's history of injury, performed a physical examination and reviewed x-rays, myelogram, MRI scan and electrophysiological studies. He opined that appellant's cervical sprain had healed based on appellant's not having symptoms of acute pain, guarding, stiffness and tenderness. Dr. Quader stated that appellant had degenerative changes in the cervical spine prior to May 30, 1990. He stated that appellant "more than likely" also had stiffness in his shoulder prior to May 30, 1990 and his shoulder joint showed arthritic changes in his left shoulder with large osteophytes. Dr. Quader opined that appellant could perform his usual work but should not perform overhead activity on his left side due to his shoulder problem.

On September 1, 1999 the Office proposed to terminate appellant's compensation benefits based on Dr. Quader's opinion. In an October 6, 1999 decision, the Office terminated appellant's compensation effective October 10, 1999.

On October 26, 1999 appellant requested an oral hearing before an Office hearing representative which was held on August 10, 2000. He also submitted additional medical evidence. In a report dated August 22, 2000, Dr. Christopher B. Shields, a Board-certified neurological surgeon, stated that appellant continued to have severe neck pain which was significantly aggravated with stooping and lifting type activities, and that his pain now extended down the entire left arm. He stated that the MRI scan revealed cervical spondylosis at the C5-6 and C6-7 levels and very small disc protrusions at the C4-5 and C6-7 levels, with some mild central spinal stenosis at the C5-6 interspace. Dr. Shields stated: "[t]he simple fact" was that appellant's condition had worsened since May 30, 1990 and he believed that appellant's condition had a direct causal relationship to the work accident.

By decision dated November 3, 2000, the Office hearing representative found that a conflict existed in the medical evidence between Dr. Shield's opinion that appellant's condition was causally related to the May 30, 1990 employment injury and Dr. Quader's opinion that appellant work-related condition had healed and remanded the case for the Office to refer appellant with the case record and a statement of accepted facts to an impartial medical specialist to resolve the conflict.

The Office referred appellant to the impartial medical specialist, Dr. Jacob M. O'Neill, a Board-certified orthopedic surgeon. In a report dated February 2, 2001, Dr. O'Neill considered appellant's history of injury, performed a physical examination and reviewed x-rays and an MRI scan dated June 22, 2000. He diagnosed cervical spine strain/compression type injury and degenerative disc disease of the cervical spine. Dr. O'Neill stated that the degenerative disc disease preexisted the May 30, 1990 employment injury, that the May 30, 1990 employment injury temporarily aggravated the preexisting degenerative disc disease and any aggravation of the degenerative disc disease would have resolved within six months of the date of the injury. He stated that the MRI scan obtained shortly following the May 30, 1990 employment injury showed no evidence of any focal disc herniation or any other pathological finding that would be expected to cause any permanent impairment. Dr. O'Neill stated that follow-up x-rays and the MRI scan performed in 2000 showed progression of degenerative change of the cervical spine "as one would expect to see from the normal aging process." He stated that "it is simply not realistic to expect" that the relatively minor injury appellant sustained would result in any permanent impairment.

By decision dated February 8, 2001, the Office found that Dr. O'Neill's report constituted the weight of the evidence medical and established that appellant's work-related aggravation of his cervical degenerative disease had ceased.

By letter dated February 27, 2001, appellant requested an oral hearing before an Office hearing representative which was held on August 31, 2001. Appellant's attorney who presented appellant's case described appellant's medical history and history of injury. He noted that appellant received temporary total disability benefits for approximately nine years and that it would seem the diagnosis of appellant's injury as a cervical strain was "wrong from the get go"

since Dr. Quader stated that cervical strains usually resolve within four to five weeks. Appellant's attorney suggested that appellant had a much more serious condition. He stated that he did not believe that appellant's condition was a worsening of a preexisting condition as a result of the aging process.

In an affidavit intended to represent his evidentiary testimony at the hearing, appellant stated that his pain had worsened since the May 1990 employment injury. He stated that asthma had never affected his ability to do his job. Appellant stated that the doctors were describing more than a cervical strain since his condition lasted for at least six years and the characterization of his condition as a cervical strain was erroneous. He stated that Dr. O'Neill used a 1991 MRI scan but Dr. Shield performed one on August 10, 2000.

In a report dated May 11, 1993, Dr. Auerbach reexamined appellant and reviewed x-rays showing "considerable" degenerative changes in the C5-6 area. He stated that appellant "could have sustained a strain of his neck that aggravated his underlying arthritic degeneration which perhaps has remained symptomatic for this length of time" but his "real problem" was his asthma and the "old fairly frozen left shoulder." Dr. Auerbach stated that appellant could not perform overhead work due to his arthritic degeneration and that he could not do heavy lifting due to his neck and shoulder but his "real detriment to working" was his asthma.

Dr. Auerbach stated:

"[Appellant] did not have any problem with the injury aggravating the basic underlying arthritic degeneration as a causative factor. Why it has persisted for three years is another matter. It could be that be that his answer is cervical fusion."

In an affidavit dated July 17, 2000, appellant's treating physician, Dr. Hugh G. Wilhite, a Board-certified family practitioner, stated that appellant had not improved since 1992 and noted that Dr. Auerbach had assessed that appellant had a 19 percent disability in his neck in 1992.

In a report dated May 31, 2001, Dr. Auerbach performed a physical examination and reviewed x-rays and an MRI scan which showed substantial arthritic degeneration in the cervical area. He stated that, if one isolated appellant's neck alone, he could perform sedentary work but not the work of an electrician. Dr. Auerbach stated that appellant was as disabled from working due to his neck as he was in 1990.

In a report dated September 10, 2001, Dr. Auerbach stated:

"[T]he history of injury in May 1990, could have caused the acute strain to [appellant's] neck, which has in many ways persisted. I do not know whether one would say he has a chronic cervical strain which has persisted all this time, based on the injury itself that has caused the chronic cervical strain or whether the injury had aggravated the degenerative condition that was present in the neck area at that time. There is a definite causal relationship as far as I am concerned with his condition then and now based on the historical information of the injury.

“The bottom line is that the injury either caused damage to the disc spaces that degenerated and remained as a chronic cervical strain or he already had degenerative change which was aggravated or even a combination of both.”

In a report dated September 24, 2001, Dr. Juan Nunez, a chiropractor, considered appellant’s history of injury, performed a physical examination and diagnosed cervicobrachial syndrome with an associated segmental dysfunction cervical/thoracic subluxation which was complicated by lumbar intervertebral disc syndrome. He stated that appellant had chronic residuals which were complicated by the degenerative disc in the cervical spine and that “[a]ny type of trauma to an existing degenerative area will in the long term cause accelerated degenerative changes and future impairment.”

In a note dated October 4, 2001, Dr. Shields stated that he reviewed Dr. Auerbach’s September 10, 2001 report and he concurred with him and his responses. He opined that appellant’s medical condition had a direct causal relationship to the 1990 accident.

By decision dated December 10, 2001, the Office hearing representative affirmed the Office’s February 8, 2001 decision.

The Board finds that the Office met its burden of proof to terminate appellant’s compensation benefits effective October 10, 1999.

Once the Office has accepted 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 The Office’s burden of proof includes the necessity of furnishing rationalized medical evidence based on a proper factual and medical background.²

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

On October 6, 1999 the Office terminated appellant’s compensation benefits based on the opinion of the referral physician, Dr. Quader. In his September 2, 1997 report, Dr. Quader opined that appellant’s cervical sprain had healed based on appellant’s not having symptoms of acute pain, guarding, stiffness and tenderness. He also stated that appellant had degenerative changes in the cervical spine prior to May 30, 1990 and that it was “more than likely” appellant’s stiffness in the shoulder preexisted the May 1990 employment injury. His opinion was well rationalized and justified the Office’s termination of benefits.

¹ *Wallace B. Page*, 46 ECAB 227, 229-30 (1994); *Jason C. Armstrong*, 40 ECAB 907, 916 (1989).

² *Larry Warner*, 43 ECAB 1027, 1032 (1992); *see Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

³ *Kathryn Haggerty*, 45 ECAB 383, 389 (1994); *Jane B. Roanhaus*, 42 ECAB 288 (1990).

Appellant subsequently submitted a medical report dated August 22, 2000 from Dr. Shields who noted that appellant had cervical spondylosis, small disc protrusions and mild spinal stenosis. He opined that appellant's condition had worsened since May 30, 1990 and that appellant's condition had a direct causal relationship to his work accident.

To resolve the conflict between Drs. Quader and Shields regarding whether appellant had a work-related disability, the Office hearing representative referred appellant to an impartial medical specialist for a medical evaluation. In his February 2, 2001 report, Dr. O'Neill opined that appellant's degenerative disc disease preexisted the May 30, 1990 employment injury, that the May 30, 1990 employment injury temporary aggravated the preexisting degenerative disc disease, and any aggravation of the degenerative disc disease would have resolved within six months of the date of the injury. He found that the MRI scan performed in 2000 showed progression of degenerative changes of the cervical spine as one would expect to see from the natural aging process.

Although appellant contends that his work-related condition was worse than the initial diagnosis of cervical strain in part because the neck condition lasted for so long, appellant did not submit medical evidence which was sufficiently rationalized to support his contention. In his May 11, 1993 report, Dr. Auerbach opined that appellant "could have sustained a strain of his neck that aggravated his underlying arthritic degeneration which perhaps has remained symptomatic for this length of time." He expressed uncertainty as to why the aggravation would have persisted for three years. Dr. Auerbach opined appellant's real problem was asthma. Because his opinion was speculative and equivocal, Dr. Auerbach's opinion is not well rationalized and is of diminished probative value.⁴ Similarly, in his September 10, 2001 report, he stated that appellant's May 1990 employment injury "could have caused" the acute cervical strain which had persisted in many ways. Dr. Auerbach stated that he was unsure whether appellant had a chronic cervical strain which had persisted for a long period of time or whether appellant's degenerative condition had been aggravated. He concluded that, either way, appellant's cervical condition was work related. Dr. Auerbach's opinion is still speculative as he is uncertain as to how the May 30, 1990 employment injury caused appellant's condition and he does not explain how an aggravation of appellant's degenerative disc condition would have been permanent. Therefore, his recent opinion is also of diminished probative value.

Dr. Wilhite's July 17, 2000 note that appellant had not improved since 1992 does not contain an opinion on causation and therefore is of diminished probative value.⁵ Dr. Nunez's September 24, 2001 opinion is not probative because he is not a doctor within the meaning of the Act. Dr. Nunez diagnosed dysfunction cervical/thoracic subluxation but did not indicate in his report that he reviewed an x-ray. For a chiropractor to qualify as a doctor within the meaning of the Act, he must show that there is a subluxation as demonstrated by x-ray to exist.⁶ Dr. Nunez also did not provide an opinion on causation but generally stated that trauma to an existing degenerative area will in the long term accelerate changes and future impairment. Dr. Shields'

⁴ *Betty M. Regan*, 49 ECAB 496, 502 (1998); *Connie Johns*, 44 ECAB 560, 571 (1993).

⁵ *See Linda I. Sprague*, 48 ECAB 386, 389-90 (1997).

⁶ *Thomas R. Horsfall*, 48 ECAB 180, 181 (1996); *Kathryn Haggerty*, 45 ECAB 383, 389 (1994).

October 4, 2001 opinion that appellant's medical condition was a direct causal relationship to the 1990 accident was not supported by a rationalized medical opinion and therefore is of diminished probative value.⁷ Moreover, he was on one side of the conflict located in this case.

None of the medical evidence appellant submitted was sufficient to counter the opinion of the impartial medical specialist, Dr. O'Neill, that appellant's cervical sprain had healed and appellant was capable of working. His opinion is well rationalized did constitutes the weight of the evidence. The Office was justified in terminating benefits based on Dr. O'Neill's opinion, and appellant did not present well-rationalized medical evidence establishing that his neck condition was work related.

The December 10, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
October 15, 2002

Michael J. Walsh
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

⁷ *Annie L. Billingsley*, 50 ECAB 210, 213 (1998).