U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES R. GARDNER and U.S. POSTAL SERVICE,
EQUIPMENT CENTER, Edgewater, NJ

Docket No. 02-1659; Submitted on the Record;
Issued April 1, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective February 27, 1999.

The case was before the Board on a prior appeal with respect to authorization for back surgery in May 1992.[1] The Board affirmed a January 3, 1994 Office decision denying authorization for the surgery; the history of the case to that point was provided in the Board's decision and is incorporated herein by reference.

As the Board noted in the prior decision, appellant sustained a low back strain on August 11, 1986. He eventually stopped working in May 1992 and began receiving compensation for temporary total disability. By letter dated January 25, 1999, the Office notified appellant that it proposed to terminate compensation for wage-loss and medical benefits based on the weight of the medical evidence.

In a decision dated February 26, 1999, the Office terminated compensation effective February 27, 1999. By decision dated March 20, 2000, the Office determined that appellant's request for reconsideration was insufficient to reopen the case for merit review. In a decision dated June 8, 2000, the Office denied appellant's request for a hearing.

By decision dated July 30, 2001, the Office reviewed the case on its merits and denied modification. In a decision dated March 13, 2002, the Office again denied modification.

The Board finds that the Office met its burden of proof to terminate compensation.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability

[1] Docket No. 94-1223 (issued February 23, 1996).

causally related to his employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.[2]

In this case, appellant's attending physician, Dr. Mario Gonzalez, submitted reports indicating that appellant remained totally disabled. The Office referred appellant for a second opinion examination by Dr. Kenneth Levitsky, a Board-certified orthopedic surgeon. In a report dated March 31, 1998, Dr. Levitsky provided a history and results on examination. He diagnosed lumbar strain with bulging L4-5 and L5-S1 discs; he stated that a lifting injury can cause bulging discs, although there was no simple explanation as to why appellant continued to have persistent pain. Dr. Levitsky indicated that appellant could return to work full time in a sedentary-type job with restrictions on lifting and other activity. He also indicated that appellant had reached maximum medical improvement and did not recommend any further therapeutic or diagnostic treatment.

The Office found that a conflict existed between Drs. Gonzalez and Levitsky with respect to the extent of employment-related disability. Section 8123(a) of the Federal Employees' Compensation Act provides that, when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.[3] When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.[4] In accord with section 8123(a), the Office referred appellant, along with medical records and a statement of accepted facts, to Dr. Michael Davoli, a Board-certified orthopedic surgeon. In a report dated November 19, 1998, Dr. Davoli provided a history and results on examination. He stated in pertinent part:

> "With regards to his current condition, it does not appear to be that the patient has any identifiable objective findings of radiculopathy nor any spasm. There are no findings of a discal process at any level noted. Therefore, it is felt that the patient's condition of lumbar strain has resolved and his subjective complaints are not in any way related to the incident of August 11, 1986.
>
> "Although the patient complained of multiple episodes of aggravation, he was able to go almost a year and a half after his original injury without complaint and, therefore, the local modalities provided were adequate and indicated that his condition had resolved as expected.
>
> "With regards to question #5, it is my clinical impression that, due to the lack of significant clinical findings, the patient should be able to return to his former duties without limitations. His most recent studies, which include studies as late as 1995, do not demonstrate anything to suggest progression of a minor bulging

[2] *Patricia A. Keller*, 45 ECAB 278 (1993).

[3] *Robert W. Blaine*, 42 ECAB 474 (1991); 5 U.S.C. § 8123(a).

[4] *William C. Bush*, 40 ECAB 1064 (1989).

disc at L4-5 and L5-S1. There are no root findings whatsoever to suggest neurologic deficit.

"In answer to question #6, I do not feel at this time that the patient requires any ongoing medical care, in light of his lack of significant findings. Bulging discs can occur in asymptomatic individuals."

Dr. Davoli provided a reasoned medical opinion that appellant did not have any continuing employment-related disability. He noted that the history of injury, results on physical examination and diagnostic tests and found that appellant could work without restrictions. Dr. Davoli also found that the employment-related condition had resolved and appellant did not require ongoing treatment.

It is well established that when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[5] The Board finds that Dr. Davoli's report is entitled to special weight and represented the weight of the medical evidence at the time of the February 26, 1999 termination decision.

After termination or modification of benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that he had an employment-related disability that continued after termination of compensation benefits.[6]

Following the termination decision, appellant submitted additional medical evidence regarding his condition. The evidence is not, however, of sufficient probative value to establish a continuing employment-related disability after February 27, 1999. In a report dated February 4, 1999, Dr. Walter Jones, III, an orthopedic surgeon, noted that appellant had sustained a lifting injury on August 11, 1986. He provided results on examination and diagnosed a chronic lumbosacral sprain and left leg radiculopathy. Dr. Jones stated that appellant was totally disabled and that he disagreed with the findings of Dr. Davoli. With respect to causal relationship with employment, Dr. Jones stated, "I do not know if this is the same problem caused by the above injury or if the patient has reinjured his back." In deposition testimony dated September 30, 1999, Dr. Jones made the following comments regarding causal relationship:

"Q. And, Doctor, how can you continue to have problems after 13 years following an injury and a surgical laminectomy, how does that happen?

"A. I do n[o]t, I can[no]t answer that. It happens.

[5] *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

[6] *Talmadge Miller*, 47 ECAB 673, 679 (1996); *see also George Servetas*, 43 ECAB 424 (1992).

"Q. Okay. In your professional occupation you have seen that on numerous occasions in similar situations?

"A. Yes."

The Board finds that the evidence from Dr. Jones on causal relationship with the employment injury is speculative and is, therefore, of diminished probative value. Medical opinions that are speculative and not supported by medical rationale are generally entitled to little probative value and are insufficient to meet appellant's burden of proof.[7] Dr. Jones did not provide a reasoned medical opinion establishing a disabling condition as of February 1999 causally related to the employment injury.

Appellant also submitted reports dated September 4, 2001 and February 15, 2002 from Dr. Frank Murphy, an orthopedic surgeon. In the September 4, 2001 report, Dr. Murphy provided a brief history without describing the August 11, 1986 employment incident. He stated, "the patient's acute lumbar strain injury has progressed to the results of secondary effects of degenerative disc disease with symptomatic radiculopathy requiring the surgical intervention." He indicated that a magnetic resonance imaging scan showed an L3-4 disc herniation, which represented a normal progression of the lumbosacral strain and appellant remained totally disabled. Dr. Murphy does not provide a complete history or clearly explain how the employment injury progressed to cause continuing disability after February 1999. His reports are also of diminished probative value to the issue presented.

The Board finds that the evidence submitted, after the February 26, 1999 decision, is insufficient to establish a continuing employment-related condition or disability after February 27, 1999, the date compensation benefits were terminated.

[7] *Carolyn F. Allen*, 47 ECAB 240 (1995).

The March 13, 2002 and July 30, 2001 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
April 1, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member