

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONALD D. PRIMUS and U.S. POSTAL SERVICE,
AIRPORT MAIL FACILITY, San Francisco, CA

*Docket No. 02-1895; Submitted on the Record;
Issued April 28, 2003*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant is entitled to compensation benefits from May 4, 2000 to December 17, 2001.

On December 26, 1989 appellant, then a 34-year-old mailhandler, filed a traumatic injury claim alleging that on December 14, 1989 he sustained torn ligaments in his right foot and muscle spasms in his right leg and middle upper back and neck pain when a mail cart he was pulling hit the back of his right foot. On February 6, 1990 the Office of Workers' Compensation Programs accepted appellant's claim for right Achilles strain and thoracic strain and authorized continuation of pay. The Office later accepted appellant's claim for lumbosacral and cervical strains. The Office entered appellant on the periodic rolls on April 27, 1990.

In a medical report dated June 30, 1992, Dr. L.S. Kimbrough, appellant's treating internist, indicated that appellant continued to complain of pain in the neck, mid back, low back, right heel, ankle and foot, as well as pain on prolonged standing, sitting, bending, stooping and walking. Dr. Kimbrough listed his impressions as chronic cervical sprain, chronic dorsal sprain, chronic sprain of the lumbar spine, chronic sprain of the right ankle and foot and right foot drop. Dr. Kimbrough advised that appellant was to return to work on September 1, 1992 in a light-duty status. He indicated that appellant was precluded from work requiring prolonged walking, repetitive bending, stooping and heavy lifting. Dr. Kimbrough noted that appellant's condition was permanent and stable, and that he did not expect for him to make a complete recovery.

The Office referred appellant to Dr. Earl V. Fogelberg, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated June 29, 1992, Dr. Fogelberg diagnosed spinalgia and pain in right foot, leg and ankle. Dr. Fogelberg indicated that there were no reliable objective findings and no reliable evidence to suggest that appellant could not return to his previous occupation as a mailhandler.

The Office thereafter found a conflict in medical opinion and referred appellant to Dr. Gene K. Bruce, a Board-certified orthopedic surgeon, for an impartial medical evaluation. In

a December 16, 1992 report, Dr. Bruce concluded that appellant was not disabled from his work as a mailhandler.

The Office, by decision dated March 4, 1993, terminated appellant's compensation effective March 7, 1993. However, the March 4, 1999 decision was reversed by the Board in a prior appeal. The Board found that, due to lack of notification of the selection of the impartial medical examiner, appellant was deprived of the opportunity to present objections to the selection of Dr. Bruce. Accordingly, Dr. Bruce could not serve as impartial medical examiner.¹

Appellant continued to see Dr. Kimbrough. In a February 11, 1997 report, Dr. Kimbrough noted that appellant continued to have multiple complaints. He listed his diagnoses as: (1) right peroneal and sciatic nerve palsy; (2) chronic sprain of the cervical spine; (3) chronic sprain of the right shoulder; (4) chronic sprain of the lumbar spine; (5) chronic sprain of the right ankle; (6) right foot anklylosed in dorsiflexion; (7) toes on the right foot anklylosed in the neutral position; (8) possible lower motor neuron disease; (9) magnetic resonance imaging scan of the LS spine reveals minimal bulging of the discs at L3-4 and L4-5; and (10) depression and personality disorder of the paranoid type. Dr. Kimbrough noted that appellant was unable to engage in work activity as a result of the listed factors.

By letter dated September 16, 1999, the Office asked appellant to select from among three different physicians for an impartial medical examination. Appellant chose Dr. Eugene A. Baciocco, a Board-certified orthopedic surgeon. Appellant was referred to Dr. Baciocco for an impartial medical examination. In a medical report dated December 15, 1999, he diagnosed right Achilles strain, lumbosacral strain, thoracic strain and cervical strain. Dr. Baciocco noted that the prolonged length of appellant's symptoms was unexplainable. He opined that appellant should have been able to recover within two months of the injury. Dr. Baciocco noted no objective findings of disability, but rather inconsistencies on examination which challenged the validity of his subjective complaints. With regard to when appellant's total disability ceased, he stated: "I believe we would be quite generous in stating that his total disability ended approximately six months after the [December 14, 1989] injury."

The record indicates that Dr. Kimbrough died and appellant was thereafter treated by Dr. Lewell Brenneman, a general practitioner. In a medical report dated November 10, 1999, Dr. Brenneman diagnosed chronic sprain cervical spine, right shoulder, lumbar, right ankle and knee, disc protrusions of L5 spine and L3-4 and L4-5. He indicated that appellant was totally disabled.

On March 8, 2000 the Office issued a notice of proposed termination of benefits. By letter dated April 27, 2000, appellant appealed the proposed termination to the Board. On November 29, 2001 the Board issued an Order Dismissing Appeal, noting that the March 8, 2000 notice of proposed termination was not a final decision.²

¹ *Donald D. Primus*, Docket No. 93-1244 (issued July 7, 1994).

² *Id.*, Docket No. 00-677 (issued November 29, 2001).

By decision dated May 3, 2000, the Office terminated appellant's benefits effective May 3, 2000. Appellant did not file a timely appeal from the May 3, 2000 decision.

On December 17, 2001 appellant filed a claim for compensation (Form CA-7), claiming compensation from March 8, 2000 to December 17, 2001 based on his December 14, 1989 injury. No new medical information was submitted. In a decision dated March 7, 2002, the Office denied appellant's claim, noting that on May 3, 2000 the Office denied further compensation and medical benefits for the previously accepted December 14, 1989 injury. The Office noted that no new evidence had been submitted since the May 3, 2000 decision and that appellant was paid compensation for total disability through May 3, 2000.

The Board finds that appellant has failed to establish that his condition during the claimed period of disability is causally related to the accepted injury of December 18, 1989.

The Board notes that appellant was paid compensation for total disability through May 3, 2000, the date of the Office's decision terminating benefits. Although appellant filed a claim for compensation for the period March 8, 2000 through December 17, 2001, he had already received benefits from March 8 through May 3, 2000. The relevant issue on appeal is whether appellant is entitled to benefits from May 4, 2000 to December 17, 2001.

Due to the conflict in opinion between appellant's treating physician, Dr. Kimbrough, and the second opinion physician, Dr. Fogelberg, the Office referred appellant to Dr. Baciocco for an impartial medical examination. Dr. Baciocco indicated that he was unable to explain the prolonged length of appellant's symptoms. Dr. Baciocco indicated that there were no objective findings of disability and that there were inconsistencies on examination which tended to challenge the validity of appellant's subjective complaints. He noted that appellant would have recovered within two months of the injury and that it would be "quite generous" in stating that appellant's total disability ceased approximately six months after the December 14, 1989 injury. Where 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.³ The Board finds that Dr. Baciocco's report is based on an accurate medical history, review of the medical file and his examination of appellant. Accordingly, the Office properly relied on Dr. Baciocco's opinion in terminating appellant's benefits effective May 3, 2000.⁴

Therefore, appellant has the burden of establishing by the weight of reliable, probative and substantial evidence that the period of claimed disability was caused or adversely affected by

³ *James R. Driscoll*, 50 ECAB 146, 154 (1998).

⁴ On November 29, 2001 the Board issued an Order Dismissing Appeal, noting that the March 8, 2000 notice of proposed termination was not a final decision. *Supra* note 2, Docket No. 00-677 (issued November 29, 2001). On May 3, 2000 the Office terminated appellant's benefits. Due to the fact that at the time appellant filed his appeal with the Board there was no final decision, the Board never took jurisdiction of the case, and the May 3, 2000 decision terminating benefits was proper.

the employment injury. As part of this burden, he must submit a complete factual and medical background showing a causal relationship between his disability and the federal employment.⁵

In the instant case, appellant has submitted insufficient evidence in support of his claim for benefits from May 4, 2000 to December 17, 2001. The November 10, 1999 medical opinion by Dr. Brenneman listed several diagnoses of appellant's physical condition but did not provide any discussion of whether appellant was disabled for the period May 4, 2000 to December 17, 2001. The 1999 report of Dr. Brenneman is not probative on this issue. Dr. Baciocco's report represents the weight of the medical evidence and established that appellant's employment disability ceased as of May 3, 2000, the date the Office terminated appellant's compensation benefits.

The decision of the Office of Workers' Compensation Programs dated March 7, 2002 is hereby affirmed.

Dated, Washington, DC
April 28, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁵ See *Nicolea Brusco*, 33 ECAB 1138 (1982).