

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ANDREW OLIVER and DEPARTMENT OF JUSTICE,  
BUREAU OF PRISONS, Memphis, TN

*Docket No. 03-838; Submitted on the Record;  
Issued July 14, 2003*

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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 to terminate appellant's compensation for wage-loss and medical expenses effective June 18, 2000.

The case is on appeal to the Board for the third time.<sup>1</sup> In the first appeal, by decision dated February 7, 1997, the Board found that, in its January 24, 1994 decision, the Office properly denied merit review pursuant to 5 U.S.C. § 8128(a) because appellant did not allege that there had been a material change in the nature of his injury-related condition, that he had been retrained or otherwise vocationally rehabilitated or that the original determination of his wage-earning capacity was erroneous. The Board also found that appellant's August 10, 1994 request for reconsideration was untimely filed and did not establish clear evidence of error. The Board therefore affirmed the Office's November 16 and 24, 1994 decisions.

On March 24, 1997 appellant filed a claim for a recurrence of disability, claiming ongoing medical problems due to the February 28, 1987 employment injury. By letter dated February 19, 1997, appellant also requested that the Board reconsider its decision.

By decision dated August 4, 1997, the Office denied appellant's claim, finding that a modification of the wage-earning capacity was not warranted. The Office found that appellant should not be compensated for his actual wage loss because he failed to show that the decision was in error or that there had been a material change or worsening in the nature and extent of his injury-related condition.

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<sup>1</sup> Docket No. 95-917 (issued February 7, 1997). Docket No. 95-917, *petition for recon. decision* (issued June 2, 1997). The facts and history surrounding the prior appeals are set forth in the initial two decisions and are hereby incorporated by reference. Appellant's claim was accepted for acromioclavicular (AC) separation, cervical strain and post-traumatic stress syndrome.

By decision dated August 28, 1998, the Branch of Hearings and Review denied appellant's request on the grounds that it was untimely.

In a report dated August 24, 1998, Dr. Rommel G. Childress, a Board-certified orthopedic surgeon, stated that appellant was in a minor motor accident on approximately August 15, 1998 where he was shaken up and had multiple aches and pains for a few days afterwards and then "quieted down." He stated that appellant continued to have difficulties with his upper extremities and his neck.

In a report dated August 4, 1999, Dr. Childress noted that appellant's accepted condition was right AC separation with associated tendinitis and bursitis of his shoulder and associated cervical spine strain and difficulty. He further noted that "early on in his treatments" appellant had symptoms of numbness, tingling and difficulty with his hands and subsequently documented bilateral ulnar nerve neuropathy, left greater than the right. Dr. Childress referred to the March 2, 1987 accident report which documented that appellant grabbed the steering wheel with both hands, basically bracing himself for the impact. He stated that appellant's "acute problem, early on, was focused primarily on his shoulder, which obviously had the separation and the most discomfort, however, with the description of the injury and bracing that he did, the post-traumatic neuropathy in both of his upper extremities are directly associated with the injury."

Dr. Childress stated:

"[Appellant made] significant efforts at rehabilitation, including being retrained in orthotics; however, the repetitive activity and the manipulative skills required for this was proved too difficult for the patient to function reliably because of continued difficulty with his hands, with numbness and tingling when he would work for more than half an hour at a time. Please see my May 19, 1997 note."

He stated that appellant's condition worsened to the extent that he referred him to Dr. Antoine Jean-Pierre, a Board-certified neurologist and psychiatrist, for therapy to treat anxiety related to his physical difficulties and his inability to return to function that he was use to. Dr. Childress stated that the electromyogram (EMG)/nerve conduction study (NCS) from 1989 suggested an abnormality in the C6 region on the right and C7 region on the left and that it correlated with the trauma to the shoulder and neck that he documented with associated symptoms. He also stated that all of appellant's symptoms were progressive. Dr. Childress concluded that from the follow-up he had done over many years, "all of [appellant's] difficulties are related to the accepted injury that happened on February 28, 1987, with AC joint separation, some progressive wear change in the area and associated nerve symptoms coming both from his neck and his extremities." He stated that appellant might need some updated diagnostic testing, was still under active treatment and continued to see Dr. Jean-Pierre.

In a report dated October 13, 1999, a district medical adviser stated that appellant had no history of complaints of symptoms of carpal tunnel syndrome or treatment of carpal tunnel syndrome for at least several years after the 1987 accident. The district medical adviser stated that there was no "AC" for carpal tunnel syndrome in the chart but there was a 1996 diagnosis for carpal tunnel syndrome in the chart but long after the 1987 accident. The district medical adviser opined that the diagnosis of carpal tunnel syndrome was not related to the 1987 accident.

In a report dated December 13, 1999, Dr. Childress stated that appellant continued to have discomfort in his neck, shoulders and hands that caused problems on a daily basis. He prescribed medicine and stated that appellant continued to have anxiety and stress related to his difficulties and, at his request, continued to see Dr. Jean-Pierre.

The functional capacity evaluation dated December 8, 1999 concluded that appellant was capable of working in the heavy category of work according to the Department of Labor guidelines and could occasionally lift up to 50 pounds.

In a report dated December 13, 1999, the second opinion physician, Dr. James T. Galyon, a Board-certified orthopedic surgeon, considered appellant's history of injury, performed a physical examination and reviewed the functional capacity evaluation dated December 8, 1999. Dr. Galyon stated that there was no irregularity of the superficial surface of the AC joint which would indicate any degree of significant subluxation. He stated that there was no crepitation in the area when appellant abducted and externally rotated his arm. Dr. Galyon concluded that appellant sustained a cervical strain and a partial or incomplete AC separation in 1987, both of which were now healed. He stated that appellant had some psychiatric problems as evidenced by his previous hospitalizations by a psychiatrist. Dr. Galyon did not believe orthopedic treatment was necessary to restore appellant to proper function.

Dr. Galyon found that there was no evidence of orthopedic disease and that a cervical strain did not exist at the time. He stated that he did not believe that appellant had an orthopedic disability and was unable to comment on appellant's complaint that the main reason he could not work was that he got "irritable and unhappy and difficult to deal with." Dr. Galyon stated that there were no objective findings to support the disability claim. Further, he stated that appellant had a current diagnosis of carpal tunnel syndrome but he did not believe that the condition was related to the cervical strain or the injuries that he might have sustained. Dr. Galyon stated that appellant did not have any work-related limitations.

In a report dated December 28, 1999, a second opinion physician, Dr. Melvin L. Goldin, a Board-certified psychiatrist and neurologist, considered appellant's history of injury, performed a mental status examination and stated that appellant had probable alcohol abuse and/or dependence with mixed personality disorder. Dr. Goldin stated that, by appellant's description, appellant no longer suffered from post-traumatic stress disorder, though it "has probably exacerbated preexisting personality dysfunction and substance abuse." He also diagnosed mixed personality disorder with various elements of paranoid personality disorder, antisocial personality disorder and severe explosivity which could well relate to elements of borderline disorder. Dr. Goldin diagnosed spondylolisthesis of the cervical spine, history of a chromioclavicular separation, cervical strain and prostatitis. He stated that, while appellant did not meet diagnostic criteria for post-traumatic stress disorder, the related impact on his other difficulties he described in his report did not prohibit him from maintaining any type of employment. Dr. Goldin stated that appellant was unable to engage in any gainful employment, as the most minimal interpersonal conflict with a supervisor, client or other runs the risk of resulting in one of his many explosive episodes of violence.

On April 17, 2000 the Office issued appellant a proposed notice of termination of compensation for wage-loss and medical expenses, stating that the medical evidence failed to

establish that he had a continuing disability as a result of the February 28, 1987 employment injury.

By decision dated May 23, 2000, the Office terminated appellant's compensation for wage-loss and medical expenses, effective June 18, 2000.

By decision dated June 15, 2000, the Office reaffirmed its May 23, 2000 decision and terminated appellant's compensation for wage-loss and medical expenses effective June 18, 2000.

By letter received by the Office on June 4, 2001, appellant requested reconsideration of the Office's decision and appellant submitted additional evidence. A hospital report dated May 17, 1999 described appellant's symptoms and provided a diagnosis of sternal fracture and cervical strain. X-rays of the spine dated May 14, 1999 showed minor degenerative change in the mid-cervical and lumbar spine and possible anterior fracture in the thoracic spine. There were degenerative changes in the right elbow. The right shoulder and the right humerus were normal. Appellant also submitted the first page of his automobile accident dated March 2, 1987 and Dr. Robert Segal's February 1 (unclear year) EMG showing no evidence of carpal tunnel syndrome bilaterally, ulnar neuropathy on the left with evidence of conduction block and mild bilateral ulnar sensory neuropathy, worse on the left.

By decision dated December 19, 2001, the Office denied appellant's request for modification.

By letter dated March 3, 2002, appellant requested reconsideration of the Office's decision and submitted additional evidence. In a report dated January 25, 2002, Dr. Allison P. Whittle, an orthopedic surgeon, considered appellant's history of injury, performed a physical examination and reviewed diagnostic tests of record including an EMG in 1994 showing ulnar neuropathy at the elbow, and an EMG/NCV in June 2001 which was negative. She also reviewed a magnetic resonance imaging (MRI) scan of the cervical spine which showed a small central disc at C3-4 with no root compromise or spinal stenosis. Dr. Whittle stated that appellant continued to have neck pain, right shoulder pain and popping, burning and tingling in his fingers and elbows, and numbness in his fingers. She diagnosed old right AC separation, chronic shoulder pain, chronic cervical pain and possible cubital tunnel syndrome. Dr. Whittle prescribed an MRI scan for the right shoulder and extension night splints for the elbows. The MRI scan dated February 1, 2002 was normal for the right shoulder.

In her report dated February 12, 2002, Dr. Whittle performed a physical examination and diagnosed right AC joint arthritis "likely related to 1987 MVA." She also diagnosed chronic cervical strain and bilateral ulnar neuropathy by examination and positive Tinel's.

By decision dated May 29, 2002, the Office denied appellant's request for modification.

The Board finds that the Office failed to meet its burden of proof to terminate appellant's compensation benefits effective June 18, 2000.

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.<sup>2</sup> The Office's burden of proof includes the necessity of furnishing rationalized medical evidence based on a proper factual and medical background.<sup>3</sup>

In this case, a conflict exists between the opinion of appellant's treating physician, Dr. Childress, and the opinion of the second opinion physician, Dr. Galyon, regarding whether appellant has any residuals from the February 18, 1997 employment injury. In his August 4, 1999 report, Dr. Childress noted that appellant's accepted condition was right AC separation with associated tendinitis and bursitis of his shoulder and associated cervical spine strain and difficulty. He stated that early on in his treatment appellant had symptoms of numbness, tingling and difficulty with his hands and subsequently had documented bilateral ulnar nerve neuropathy, left greater than the right. Dr. Childress stated that the March 2, 1987 accident report indicated that appellant braced himself and that the bracing action, the description of the injury and the post-traumatic neuropathy in the upper extremities were directly associated with the injury. He also stated that the efforts of rehabilitation involving repetitive activity and manipulative skills resulted in numbness and tingling in appellant's hands and prevented him from working for more than a half hour at a time. Dr. Childress believed the 1989 EMG/NCS showed an abnormality in the C6 region on the right and C7 region on the left which correlated with the trauma to appellant's shoulder and neck. He stated that appellant's symptoms were progressive, and all of his difficulties related to the accepted injury with AC joint separation, some progressive wear change in the area and associated nerve symptoms coming both from his neck and his extremities. The hospital report dated May 17, 1999 stated that appellant had a sternal fracture and cervical strain. X-rays of the spine dated May 14, 1999 showed minor degenerative changes in the mid-cervical and lumbar spine and degenerative change in the right elbow which are supportive of Dr. Childress' findings.

In his December 13, 1999 report, Dr. Galyon found that there were no objective findings of disability, that appellant had carpal tunnel syndrome but it was not related to the cervical strain or his injuries and the cervical strain and AC separation had healed. In his December 28, 1999 report, the second opinion physician, he stated that appellant had probable alcohol abuse and/or dependence with mixed personality disorder. Dr. Galyon opined that appellant no longer suffered from post-traumatic stress disorder although it had "probably exacerbated preexisting personality dysfunction and substance abuse."

Since a conflict exists between Drs. Childress and Galyon's opinions regarding whether appellant continued to suffer residuals from the accepted injuries of AC separation and cervical strain, the Office has failed to meet its burden to terminate benefits. Moreover, Dr. Goldin's opinion that appellant no longer suffered from post-traumatic stress disorder although it had "probably exacerbated preexisting personality dysfunction and substance abuse" is speculative and therefore is of diminished probative value.<sup>4</sup> His opinion suggests that appellant's post-

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<sup>2</sup> *Wallace B. Page*, 46 ECAB 227, 229-30 (1994); *Jason C. Armstrong*, 40 ECAB 907, 916 (1989).

<sup>3</sup> *Larry Warner*, 43 ECAB 1027, 1032 (1992); *see Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>4</sup> *See Linda I. Sprague*, 48 ECAB 386, 390 (1997).

traumatic stress syndrome might have aggravated a preexisting emotional condition although he is tentative and does not describe how long the aggravation lasted. An aggravation of a preexisting condition is compensable.<sup>5</sup>

The May 29, 2002 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC  
July 14, 2003

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>5</sup> *Mary A. Moultry*, 48 ECAB 566, 568 (1997).