U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of STANLEY DROZDOWSKI and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION HOSPITAL, Philadelphia, PA

Docket No. 02-972; Submitted on the Record;
Issued March 4, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective March 25, 2001.

On December 2, 1999 appellant, then a 48-year-old carpenter, filed a notice of traumatic injury and claim for compensation (Form CA-1), alleging that on November 2, 1999 while disassembling a room a panel coated with lead fell on his head.

In a November 14, 1999 progress note, Dr. Alan Tressler, a neurologist, diagnosed appellant with Grade I retrolisthesis of C3 upon C4 with endplate degenerative changes and spondylotic changes of the cervical spine, most marked at the C6-7 level, where he found a diffuse disc bulge, slightly eccentric towards the right causing mild to moderate narrowing of the right neural foramen.

In a January 3, 2000 report, Dr. Tressler diagnosed appellant with post-traumatic headaches and a cervical strain.

In a January 10, 2000 decision, the Office accepted appellant's claim for cervical strain and concussion.

In a March 29, 2000 report, Drs. Carl Shin and Curtis Slipman, physiatrists, indicated that appellant complained of headaches, neck pain and low back pain. They ruled out cervical radiculopathy in the C7 nerve root, disc facet medicated headaches and cervical discogenic pain, but attributed his symptomology to the accepted injury.

In an April 4, 2000 letter, appellant was referred for a second opinion to Dr. Robert Aikens, a neurologist.

In a May 1, 2000 report, Dr. Aikens diagnosed post-traumatic headaches, cervical and lumbar strains. He found that appellant could return to restricted duty eight hours per day and unrestricted full-time duty in three to six months.

In a June 8, 2000 report, Drs. Shin and Slipman diagnosed appellant with headaches likely secondary to C2-3 facet joint, left neck-facet joint syndrome vs. discogenic pain, left elbow pain possibly somatic referred from the disc of the facet joints and bilateral back pain.

In a June 26, 2000 letter, the employing establishment offered appellant a light-duty position four hours per day which the Office found suitable.

Appellant did not respond to this offer. In a June 30, 2000 report, Dr. Shin recommended that appellant not return to work for an additional four weeks due to "poorly controlled pain in neck, arm and back and his inability to concentrate for any meaningful task.

In a September 1, 2000 letter, the Office found a conflict in the medical evidence and referred appellant to Dr. Richard H. Bennett, a Board-certified neurologist, for an independent medical examination.[1]

In a September 26, 2000 report, Dr. Bennett wrote:

> "Motor examination reveals normal strength in both upper and lower extremities proximally and distally with no evidence of muscle wasting, weakness or atrophy. Fine as well as gross motor movements are performed without difficulty and deep tendon reflexes are equal and symmetrical at the biceps, triceps, knees and ankles.… Sensory testing is intact…. On musculoskeletal testing [appellant] reports a chronic variable pain above his eyes and across the mid forehead. He also reports varying degrees of discomfort in the cervical region and along the inner aspect of his left elbow. In those areas no localized swelling, point tenderness or inflammation was noted.… [Appellant] was able to stand and walk without difficulty. Tinel's, Phalen's, and Adson's maneuvers were negative bilaterally.
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> "Based upon my examination, I cannot identify any objective evidence of neurological or orthopedic impairment currently affecting [appellant], which are specifically relate[d] to events stemming from November 2, 1999. [Appellant's] examination reveals evidence of degenerative diskogenic (sic) disease of the cervical spine which is age related and clearly preexistent. The degenerative changes may account for his complaints of intermittent cervical tightness.…
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> "It is my opinion that [appellant] is able to return to work in a full-time capacity as a carpenter without restrictions requiring no additional treatment or further diagnostic tests."

[1] On August 25, 2000 the Office scheduled appellant for an independent medical examination with Dr. Elliot Mancall that was later cancelled because the appointment was not to occur until December 19, 2000, a date the Office determined to be too far in the future.

In a November 6, 2000 letter, the Office proposed terminating appellant's compensation.

In a December 27, 2000 report, Dr. Slipman diagnosed appellant with cervical internal disc disruption syndrome at C3-4, low back pain and headaches and recommended cervical fusion.

In a January 24, 2001 letter, Dr. Bennett, responding to the Office request for a clarifying report, indicated that he had read Dr. Slipman's report and the findings noted are consistent with degenerative cervical arthritis. He further added that "the additional materials did not in any way alter or change my opinions…. Moreover, [appellant] has age-related degenerative disc disease of the cervical spine. His examination revealed no objective findings. His discomfort appeared to be nondisabling…."

In a February 28, 2001 decision, the Office terminated appellant's compensation finding that the weight of the evidence rested with Dr. Bennett as the impartial medical examiner and that appellant no longer had residuals of the accepted conditions.

Appellant requested a written review by the Branch of Hearings and Review. In support of his request, appellant's representative argued that the Office improperly selected Dr. Bennett as the referee examiner, failing to properly utilize the PDS system. As evidence of this impropriety, he pointed out that the PDS system is alphabetical and when he reviewed a similar listing of referrals in appellant's region, there appeared to be several doctors in between, the original referral to Dr. Mancall and the subsequent referral to Dr. Bennett. Appellant's representative further argued that Dr. Bennett never had a proper understanding of appellant's injury, and that at the time of Dr. Bennett's selection there was no conflict in the medical evidence.

In a February 21, 2002 decision, the hearing representative terminated appellant's compensation effective March 25, 2001 finding the weight of the evidence rested with Dr. Bennett as the independent medical examiner.

The Board finds the Office properly terminated appellant's compensation.

Under the Federal Employees' Compensation Act,[2] once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.[3] The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[4] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[5]

[2] 5 U.S.C. §§ 8101-8193.

[3] *Charles E. Minniss,* 40 ECAB 708, 716 (1989); *Vivien L. Minor,* 37 ECAB 541, 546 (1986).

[4] *Id.*

[5] *See Del K. Rykert,* 40 ECAB 284, 295-96 (1988).

The Office properly determined that there was a conflict in the medical opinion between Drs. Slipman and Shin, appellant's attending physicians, and Dr. Aikens, a Board-certified neurologist, acting as an Office referral physician, on whether appellant had ongoing disability related to his November 2, 1999 accepted injury. In order to resolve the conflict, the Office properly referred appellant, pursuant to section 8123(a) of the Act, to Dr. Bennett, a Board-certified neurologist, for an impartial medical examination and an opinion on the matter.[6]

In situations where there exist 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 upon a proper factual background, must be given special weight.[7]

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Bennett, the impartial medical specialist selected to resolve the conflict in the medical opinion. The September 26, 2000 and January 24, 2001 reports of Dr. Bennett establish that appellant had no continuing disability related to the November 2, 1999 accepted injury.

The Board has carefully reviewed the opinion of Dr. Bennett and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Bennett's opinion is based on a proper factual and medical history in that he had the benefit of an accurate and up-to-date statement of accepted facts, provided a thorough factual and medical history and accurately summarized the relevant medical evidence. Moreover, Dr. Bennett, in his January 24, 2001 report, provided a proper analysis of the factual and medical history and the findings on examination, including the results of diagnostic testing and reached conclusions regarding appellant's condition which comported with this analysis.[8] Dr. Bennett provided medical rationale for his opinion by explaining that he could find no objective evidence to support continuing disability and that appellant had preexisting degenerative disc disease.

Appellant's representative argued the Office did not follow its procedures in selecting Dr. Bennett, but submitted no convincing evidence to support that argument. The fact that Dr. Bennett is not alphabetically close to Dr. Mancall does not, by itself, establish an abuse of the system. There are several reasons that other doctors could be passed over before Dr. Bennett was selected including availability, conflict and refusal to accept workers' compensation claims.

Appellant's argument that Dr. Bennett did not understand appellant's initial injury is not supported by the record. The record is clear that Dr. Bennett had the benefit of appellant's entire medical history related to this incident and the statement of accepted facts and he indicated that he had reviewed them.

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[6] Section 8123(a) of the Act provides in pertinent part: "If there is 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." 5 U.S.C. § 8123(a).

[7] *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

[8] *See Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

The decisions of the Office of Workers' Compensation Program dated February 21, 2002 and February 28, 2001 are hereby affirmed.

Dated, Washington, DC
March 4, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member