

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM R. McGHEE and U.S. POSTAL SERVICE,
BULK MAIL CENTER, Philadelphia, PA

*Docket No. 03-1816; Submitted on the Record;
Issued October 1, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective August 10, 2002.

On July 1, 1996 appellant, then a 40-year-old distribution clerk, filed an occupational disease claim alleging that he developed a sharp pain in his right shoulder at work. He first became aware of this condition on June 21, 1996 and stopped work that day.¹ The Office accepted his claim for cervical sprain with right shoulder myositis and paid compensation for temporary total disability. Appellant was released to limited duty on July 3, 1996. The Office later expanded its acceptance of appellant's claim to include bilateral carpal tunnel syndrome.

On September 26, 1997 appellant returned to work full time as a modified distribution clerk, with earnings equal to those of his date-of-injury position. The Office determined that he was no longer entitled to compensation for wage loss, but advised that its decision did not affect his entitlement to medical benefits or treatment for the accepted work injury.

On December 20, 2000 Dr. Steven J. Valentino, an osteopathic physician, acting as an Office referral physician, reported that, based on his evaluation of appellant and his review of medical records and diagnostic studies, appellant had fully recovered from his June 21, 1996 employment injury without residuals or need for ongoing supervised medical care. There was no objective evidence that the condition sustained on June 21, 1996 was active or causing objective findings and there were some findings suggestive of symptom magnification or embellishment.

On February 8, 2001 the Office issued a notice of proposed termination of compensation. The Office advised that, based on Dr. Valentino's report, appellant no longer had any continuing

¹ Appellant's supervisor stated that appellant returned to work on June 18, 1996 following left shoulder surgery. At the end of his first shift, appellant called his supervisor to report that he had right shoulder discomfort. He worked limited duty from June 19 to June 21, 1996, when he stopped work completely.

disability referable to the accepted work injury. The Office provided appellant 30 days to submit additional evidence or argument.

On February 22, 2001 Dr. Harris A. Ross, a Board-certified physiatrist and appellant's attending physician, reported that appellant was not magnifying his symptoms. His examination found spasm in the cervical region as well as trigger points in the trapezii musculature and upper cervical region. Shoulders were tender. Dr. Ross stated: "It is my opinion that [appellant] suffers from cumulative trauma syndrome involving the right shoulder and reoccurrence [sic] of the pain and a possible bursitis of the left shoulder that has been previously operated on." He reported that the treatments rendered to appellant allowed him to fulfill his goal of working without the use of narcotics or pain killers.

To resolve the conflict between Dr. Valentino and Dr. Ross, the Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. John T. Williams, a Board-certified orthopedic surgeon, for an impartial medical evaluation.

On July 23, 2001 Dr. Williams expressly agreed with Dr. Valentino that the effects of appellant's work injury had resolved and that appellant was no longer in need of treatment for that medical condition. He felt that the acupuncture and the various therapies appellant was receiving were not necessary or appropriate and were not related to the June 21, 1996 incident. Rather, they were being used to treat chronic problems with his shoulders, elbow and wrists that were not work related.

In a decision dated August 16, 2001, the Office terminated appellant's compensation benefits on the grounds that the weight of the medical evidence, as represented by the opinion of the impartial medical specialist, established that he had recovered from his accepted work injury.

Appellant requested an oral hearing before an Office hearing representative.

On March 1, 2002 appellant sustained a right shoulder strain while picking up handfuls of mail from a debris hamper.

In a decision dated April 12, 2002, the hearing representative vacated the Office's August 16, 2001 decision on the grounds that the statement of accepted facts provided to Dr. Williams contained no accepted conditions and improperly contained summaries of medical reports and tests. The hearing representative remanded the case to the district Office for the preparation of a proper statement of accepted facts and for referral to a new impartial medical specialist.²

On remand, the Office referred appellant, together with the entire case file and a revised statement of accepted facts, to Dr. Joseph A. Jelen, Jr., a Board-certified orthopedic surgeon, for an impartial medical evaluation.

² The Board notes that exclusion of Dr. Williams' medical report was not required in this case. *See generally Samuel Theriault*, 45 ECAB 586 (1994).

In a report dated June 4, 2002, Dr. Jelen indicated that he had reviewed appellant's case file and the documents brought by appellant to the examination. After noting the results of prior diagnostic studies, he related appellant's history, complaints and findings on physical examination. Dr. Jelen diagnosed chronic cervical strain, shoulder tendinitis and ulnar neuropathy at the level of the elbow. He offered the following conclusions:

"The above findings represent [appellant's] present condition. These findings are indeed, chronic and not the result of his work injury from June 21, 1996.

"Findings on the [magnetic resonance imaging] MRI scan of the cervical spine would indicate that there is some evidence of disc desiccation at all levels, an age-related phenomenon. There does not appear to be any specific disc abnormality that can be anatomically correlated with any of [appellant's] complaints of pain. [In] fact, the C5-6 disc protrusion labeled as mild to moderate was eccentric to the left and not the right side.

"The findings on the MRI [scan] of the shoulder dated March 22, 2002 show a partial thickness 'abnormality.' There was never an indication that [appellant] had a torn rotator cuff, only signs of [the] MRI [scan] 'abnormality' that could be labeled as a tendinitis type process. In fact, there was a finding on [the] MRI [scan] that 'no bursitis or full thickness tear' was seen.

"During the examination [appellant] showed signs of symptom magnification. There is no physiologic reason to have posterior shoulder pain with forward flexion of the lumbar spine. The degree to which [appellant] responded to my light touch and pressure over the posterior neck, thoracic spine and shoulders was to a degree that also would represent an unphysiologic sign."

Dr. Jelen reported that the diagnoses established under the statement of accepted facts as a result of the injury had resolved. Appellant's present condition he stated, was the result of wear and degeneration. Dr. Jelen continued:

"[Appellant] sustained minor injuries to the right shoulder on June 21, 1996 while tossing small bundles of mail. This type of trauma usually recovers quickly with appropriate care.

"[Appellant] did indeed, recover and returned to light work on July 2, 1996 where he should continue to function.

"On physical examination there were signs of symptom magnification. The overall strength in the upper extremities was good and of sufficient degree to allow [appellant] to participate in his 'modified distribution clerk position' where he is able to sit, walk, stand and reach in an unlimited fashion. However, because there are symptoms of chronic shoulder tend[i]nitis, reaching above shoulder level should be limited to two hours [a] day. This work modification can easily be solved by placing all bins at shoulder level or below. [Appellant] is able to lift, push and pull 30 pounds and continue to work without restriction.

“I see no significant new injury that [appellant] allegedly reported as occurring on March 1, 2002. In the office he was able to function normally within limits of the examination complaining only of discomfort during removal and reapplication of his shirt and intermittently during the examination. There were no specific objective findings regarding functional mobility and strength in the upper extremities that would warrant any decrease in [appellant’s] activity or ability to work in his former position.

“[Appellant’s] ability to function was limited mostly because of complaints of pain that is subjective in nature.

“At the present time [appellant] may continue to work without restriction in his modified distribution clerk position.

“These opinions were formed based upon review of the records provided, [appellant’s] history and physical examination. If more information is available, I would be glad to give further opinions regarding his condition.”

On July 1, 2002 the Office issued a notice of proposed termination of compensation. The Office advised that the weight of the medical evidence established that appellant had recovered from the effects of his June 21, 1996 employment injury. The Office provided appellant 30 days to submit additional evidence or argument.

In a decision dated August 7, 2002, the Office terminated appellant’s compensation benefits effective August 10, 2002, on the grounds that the weight of the medical evidence established that he no longer suffered from residuals of his accepted employment injury.

Appellant requested a review of the written record by an Office hearing representative. In a decision dated July 8, 2003, the hearing representative affirmed the termination of appellant’s compensation benefits. The hearing representative found that the opinion of Dr. Jelen constituted the weight of the medical evidence and supported that appellant’s injury-related condition had resolved.

The Board finds that the Office properly terminated appellant’s compensation benefits effective August 10, 2002.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.³ 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.⁴

³ *Harold S. McGough*, 36 ECAB 332 (1984).

⁴ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

A conflict in medical opinion arose between Dr. Valentino, an Office referral physician and Dr. Ross, a Board-certified psychiatrist and appellant's attending physician, on whether appellant continued to suffer from his accepted employment injury. Section 8123(a) of the Federal Employees' Compensation Act provides in 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 To resolve this conflict, the Office referred appellant to Dr. Jelen, a Board-certified orthopedic surgeon.

In his June 4, 2002 report, Dr. Jelen reported that appellant did not currently suffer from the effects of his June 21, 1996 work injury. He stated that the injury appellant sustained while tossing small bundles of mail was minor. That type of trauma, he explained, usually recovered quickly with appropriate care and, indeed, appellant recovered to return to light duty on July 2, 1996. Dr. Jelen diagnosed chronic cervical strain, shoulder tendinitis and ulnar neuropathy at the level of the elbow. Appellant's current condition, however, was not the result of the June 21, 1996 work injury; it was chronic, the result of wear and degeneration. The diagnoses accepted as resulting from that work injury had resolved.

When 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.⁶

Dr. Jelen based his opinion on appellant's case file, the revised statement of accepted facts, appellant's history and his findings on physical examination. The Board finds that his opinion is based on a proper factual background and is sufficiently well rationalized that it is entitled to special weight in resolving the conflict that arose between Dr. Valentino and Dr. Ross. The opinion of the impartial medical specialist represents the weight of the medical opinion evidence and establishes that residuals of the accepted employment injury resolved by August 10, 2002, the effective date of termination. The Office met its burden of proof.

⁵ 5 U.S.C. § 8123(a).

⁶ *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

The July 8, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
October 1, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member