United States Department of Labor
Employees Compensation Appeals Board

JOHN H. DILLIG, Appellant	)	
and	)	**Docket No. 04-241**
	)	**Issued: April 29, 2004**
DEPARTMENT OF THE AIR FORCE, TAW DPC Satellite, Milwaukee, WI, Employer	)	

Appearances:
John H. Dillig, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On November 5, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated October 7, 2003, which terminated compensation benefits. Pursuant to 20 C.F.R. §§ 501.2 (c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue on appeal is whether the Office met its burden of proof in terminating appellant's wage-loss and medical benefits effective October 7, 2003, on the grounds that his work-related disability had ceased on or before that date.

FACTUAL HISTORY

On July 14, 1993 appellant, then a 48-year-old aircraft mechanic filed an occupational disease claim alleging that he developed pain and throbbing in both knees and neck beginning July 9, 1988, as a result of frequent climbing on aircraft stands and into tight areas, bending and lifting heavy objects in his federal employment. Appellant worked for the employing

establishment for over 27 years in both active duty and civil service. From 1963 to 1967 appellant was on active duty and performed duties as an aircraft mechanic and from 1970 through 1976 he worked as a flight line mechanic. From July 1976 through July 1993 appellant resumed the position of aircraft mechanic. The Office accepted appellant's occupational disease claim for aggravation of bursitis of the knees, bilaterally and aggravation of degenerative disc disease of the cervical spine.[1] Appellant stopped working on or about July 13, 1993 and received regular wage-loss compensation and medical benefits for his work-related conditions. He has not returned.

Dr. Russell Robertson, appellant's Board-certified family practitioner, treated and referred him for chiropractic care for his 1988 work-related conditions. In a letter dated May 16, 2002, the Office requested that Dr. Robertson advise as to whether appellant's aggravation of bursitis of the knees and aggravation of degenerative disc disease of the cervical spine remained active or had returned to its baseline level. The Office noted that, if the physician opined that the work-related aggravations remained active, it required explanation as to what was keeping the aggravations active given that he had not been exposed to employment factors in nine years. The Office further inquired as to whether appellant was medically capable of performing his date-of-injury job as an aircraft mechanic based solely on active residuals of the work-related bilateral knee and cervical spine conditions.

Dr. Robertson responded in an undated report that appellant's work-related aggravations remained active and opined that appellant was not capable of performing repetitive activity that would involve any kind of work or strain on his knees, elbows, hands and wrists or any of his duties as an aircraft mechanic as described in the statement of accepted facts. Dr. Robertson indicated that, regarding continuing treatment, appellant's pain was considerably moderated by chiropractic treatment. In a report dated June 10, 2002, Dr. Robertson stated that appellant could not perform any work due to his previous injuries and surgery.

The Office also referred appellant to Dr. Vijay Kulkarni, a Board-certified orthopedic surgeon, for a second opinion evaluation and the Office received three reports from the physician dated June 14, July 1 and 23, 2002. In the June 14, 2002 report, Dr. Kulkarni discussed appellant's employment and medical history since 1988 and the onset and progression of his chronic neck and knee pain. The physician diagnosed degenerative disc disease of the cervical spine at C5-6 with spinal and foraminal stenosis, degenerative arthritis of both knees and degenerative disc disease of the lumbar spine. He opined that appellant had disabling residuals of pain related to his cervical spine and knee conditions caused by his work performed for 17 years as an aircraft mechanic and recommended continued chiropractic care for three months. Following a request from the Office for further medical opinion, Dr. Kulkarni submitted a report dated July 1, 2002. He clarified his opinion that appellant had a preexisting cervical spondylosis condition, which resulted from work exposure over 17 years, which became aggravated by his work on July 8, 1993 to the extent that he was unable to return to work since July 13, 1993. Dr. Kulkarni indicated that appellant's aggravation of the preexisting bursitis and degenerative arthritis of the knees was not active at that time and that based on an evaluation of appellant's

[1] Appellant has several previously accepted work injuries, which are not a part of this claim. They include: a left toe fracture in 1982, a cut to the left palm in 1984, a cut above the right eye in 1985, red spots and itching of forearms in 1985 and neck pain in 1991 all related to work exposure or duties.

neck problems he was capable of working in a sedentary job with restrictions, which he outlined on an attached work capacity evaluation form.

The Office reviewed Dr. Kulkarni's July 1, 2002 findings and requested further clarification. In a July 23, 2002 report, Dr. Kulkarni stated that appellant's aggravation of the cervical spine remained active as there were objective findings of restrictive motion, pain and guarding. The referral physician noted that appellant was capable of working eight hours per day with restrictions previously provided related to the accepted condition and that continued chiropractic treatment would be beneficial for some time with an eventual home exercise program solely maintained by appellant.

The Office authorized x-rays and a magnetic resonance imaging (MRI) scan of the cervical spine taken July 31, 2002 following Dr. Kulkarni's examination, which showed disc herniation at C6-7, mild to moderate central canal narrowing at C5-6 without cord deformity, multi-level degenerative disc disease, worse at C5-6 and C6-7 and bilateral neural foraminal narrowing at C5-6 and C6-7.

On August 13, 2002 the Office requested that Dr. Robertson review the second opinion reports from Dr. Kulkarni and respond to his findings. The Office noted that based on Dr. Kulkarni's findings and opinions it authorized physical therapy through November 30, 2002.

In a report received October 7, 2002, Dr. Robertson responded to the Office request and reviewed Dr. Kulkarni's reports. Dr. Robertson disagreed with Dr. Kulkarni that appellant's work-related aggravation of degenerative arthritis of the knees had ceased and stated that he had primarily relied on appellant's reporting of significant bilateral knee pain that was associated with any repetitive activity involving bending and lifting. Regarding appellant's cervical condition, Dr. Robertson stated that given appellant's physical symptomology he could not justify only a five percent disability as recommended by Dr. Kulkarni and opined that appellant had a bilateral cervical radiculopathy that makes any kind of repetitive motions with his upper extremities or those that involve lifting of objects as light as a coffee cup impossible for him to do in a repetitive manner. He concluded that appellant was incapable of engaging in any kind of productive employment whatsoever. Regarding treatment, Dr. Robertson stated that appellant required a period longer than three months for pain control.

On October 10, 2002 the Office determined that there was a conflict in medical opinion regarding the extent of appellant's work-related disability and referred appellant to Dr. Mark Aschliman, a Board-certified orthopedic surgeon, for an independent medical examination. In a report dated March 13, 2003, Dr. Aschliman reviewed appellant's extensive employment and medical history and his current complaints of bilateral knee discomfort with squatting or too much activity, headaches, neck discomfort, diffuse left shoulder and occasional left upper extremity pain. The referee physician stated:

> "It is my opinion that [appellant] has a condition of cervical spondylosis with cervical discomfort with significant somatization and symptom magnification with nonphysiologic pain behavior. The cervical spondylosis is a progressive degenerative process and has nothing to do with the work activities of the examinee. The job duties have been thoroughly reviewed and these activities

> would not be consistent with activities that would cause directly the development of cervical spondylosis. Neither would these activities be activities that would aggravated [sic] beyond normal progression on a permanent or structural basis the condition. Rather the activities at times may have been associated with the manifestation of discomfort. Upon cessation of the work activities the examinee would return to his baseline status of progressively deteriorating cervical spondylosis and increasing symptoms. This is what occurred. There was no indication that [appellant] has been out of the workplace for nearly 10 years and continues to have subjective complaints of discomfort that are consistent with the nature of his underlying condition."

Dr. Aschliman further reviewed both Drs. Robertson and Kulkarni's findings. He stated that each physician related appellant's cervical condition to his work activities although that opinion could not be substantiated and that the job duties were not consistent with activities that would lead to the development of cervical spondylosis. Dr. Aschliman agreed with Dr. Kulkarni that ongoing symptoms have simply represented a progression of the underlying condition of the examinee but disagreed that the condition was aggravated permanently by the work activities. Dr. Aschliman concluded that appellant's cervical spondylosis and bilateral knee arthrosis conditions were at most symptomatically aggravated by his work activities without structural breakage or permanent injury having been sustained. He found that appellant returned to his baseline relative to his cervical and knee condition by the very latest October 13, 1993, three months after cessation of work activities and that his complaints relate in no way to his work activities of nearly a decade ago. Dr. Aschliman then indicated based solely on active residuals of appellant's work-related bilateral knee and cervical spine conditions he was medically able to perform the duties of his date-of-injury job as an aircraft mechanic and that no restrictions were warranted related to appellant's industrial claim. Regarding treatment he noted that appellant had participated in extensive evaluation and treatment of his conditions without significant functional improvement and that continuing medical or chiropractic treatment would not change the condition. Dr. Aschliman concluded that ongoing treatment with regards to the work activities had not been warranted since October 13, 1993.

Following Dr. Aschliman's examination, the Office referred appellant to Dr. C.E. Moore, a Board-certified psychiatrist, who submitted a report dated July 22, 2003. In his report, Dr. Moore reviewed appellant's medical, family and social history and his psychiatric examination. He indicated that appellant gave a history consistent with chronic generalized anxiety disorder with panic attacks and a chronic major depressive disorder, however, opined that appellant's work injury was not responsible for his present emotional condition. Dr. Moore recommended that appellant see a local psychiatrist for treatment.

On August 20, 2003 the Office issued a notice of proposed termination of compensation and medical benefits based on Dr. Aschliman's March 13, 2003 findings.

Following the notice of proposed termination, the Office authorized diagnostic reports and a consultation examination with Dr. T.J. Flatley, a Board-certified orthopedic surgeon. In a report dated September 10, 2003, Dr. Flatley reviewed medical reports, his examination of appellant and results of new x-rays and an MRI scan and diagnosed degenerative disc disease of C5-6 and C6-7 associated with spinal stenosis. He opined that, given solely appellant's cervical

problems, appellant should not be working as an aircraft mechanic and regarding causation, he stated that appellant's working as an aircraft mechanic over a 27-year period had aggravated the degenerative disc disease of his cervical spine. Dr. Flatley indicated that, while it had not caused the arthritic changes, it was a definite aggravation and accelerated the condition beyond a normal course.

The Office also received a September 16, 2003 report from Dr. Robertson, which concurred with Dr. Flatley's opinion regarding appellant's current condition and his inability to work in any meaningful way. He further indicated that appellant's condition and disability itself exacerbated his emotional condition.

By decision dated October 7, 2003, the Office terminated appellant's entitlement to compensation and medical benefits on the grounds that he had no residual condition or disability causally related to his accepted employment injury.

LEGAL PRECEDENT

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

ANALYSIS

Appellant's physician, Dr. Robertson, reported that his work-related aggravations of bursitis of the knees and degenerative disc disease of the cervical spine remained active and opined that appellant was not capable of performing repetitive activity that would involve any kind of work or strain on his knees, elbows, hands and wrists or any of his duties as an aircraft mechanic. The physician later opined that appellant was incapable of engaging in any kind of productive employment whatsoever and that, regarding treatment, appellant required a period longer than three months for pain control. Dr. Kulkarni, a second opinion physician, indicated that appellant indeed had aggravations of a preexisting cervical spine condition and preexisting bursitis as well as degenerative arthritis of the knees due to the July 8, 1993 work injury, however, based on his evaluation, only the cervical spine remained active and appellant was capable of working in a full-time sedentary job with restrictions. Based on this conflict in medical opinion, as to whether appellant continued to have residuals of his accepted employment

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

[3] *Id*.

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

injuries and remained disabled for work, the Office properly referred him to Dr. Aschliman, a Board-certified orthopedic surgeon, for an impartial examination.[5]

In a report dated March 13, 2003, Dr. Aschliman discussed appellant's history of injury and the medical treatment he received. Following his physical examination, Dr. Aschliman found that the natural progression of appellant's accepted conditions of aggravation of bursitis of the knees bilaterally and aggravation of degenerative disc disease of the cervical spine was the root of his current pain syndrome and inability to work and not an active aggravation of those conditions. He further found that additional chiropractic treatment would not improve his condition. Dr. Aschliman's report was supported by substantial medical reasoning that appellant's previous employment duties were no longer contributing to the underlying conditions in his neck and knees. The Office found that Dr. Aschliman sufficiently explained that the aggravations that appellant sustained while working had resolved after he ceased work in 1993, without imposing any permanent structural damage to his knees and cervical spine and consequently appellant was capable of performing his date-of-injury duties as an aircraft mechanic.

Following the notice of proposed termination, Dr. Flatley, a Board-certified orthopedic surgeon and one of appellant's attending physicians, submitted a report dated September 10, 2003, with opinion contrary to that provided by Dr. Aschliman, the impartial medical specialist and Dr. Robertson submitted a September 16, 2003 report, which concurred with his findings. The Board finds that these reports fail to overcome the weight of the impartial medical specialist's report. In the September 10, 2003 report, Dr. Flatley stated that appellant's position aggravated his degenerative disc disease of his cervical spine and that based solely on the cervical problems appellant should not be working as an aircraft mechanic. Dr. Flatley does not provide sufficient reason why appellant is unable to perform specific limited duties given his active cervical problems as a result of the accepted work-related injuries to change the outcome of the termination decision. Furthermore, Dr. Robertson's concurring opinion that appellant was unable to work was addressed in earlier reports which represented one side of the medical conflict that Dr. Aschliman later resolved.

The Board finds that the Office properly relied on the impartial medical examiner's March 13, 2003 report, as a basis for terminating benefits. Dr. Aschliman's opinion is sufficiently well rationalized and based upon a proper factual background. He not only examined appellant, but also reviewed his medical records. Dr. Aschliman also reported accurate and thorough medical and employment histories and provided a well-rationalized medical opinion regarding whether appellant had work-related residuals of the accepted conditions disabling him from work.[6] The Office properly accorded determinative weight to the

[5] 5 U.S.C. § 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 person shall be appointed to make an examination to resolve the conflict. *Henry P. Eanes*, 43 ECAB 510 (1992).

[6] The Board notes that Dr. Moore, a Board-certified psychiatrist and Office referral physician determined that appellant had chronic generalized anxiety disorder with panic attacks and a chronic major depressive disorder; however, appellant's work injury was not responsible for the diagnosed emotional condition.

impartial medical examiner's March 13, 2003 findings.[7] Accordingly, the Board finds that the Office met its burden of proof in terminating appellant's wage-loss compensation and medical benefits.

CONCLUSION

The Board finds that the Office properly terminated appellant's wage-loss and compensation benefits effective October 7, 2003.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 7, 2003 is affirmed.

Issued: April 29, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[7] In cases where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight. *Gary R. Sieber*, 46 ECAB 215, 225 (1994).