

1992 decisions of the Office on the grounds that the Office met its burden of proof to terminate appellant's compensation effective February 5, 1991. The Board found that the weight of the medical evidence rested with the opinion of Dr. Gordon P. Nutik, a Board-certified orthopedic surgeon, who served as an impartial medical specialist. Dr. Nutik determined that appellant had no disability after February 5, 1991 due to his January 17, 1988 employment injury.²

In the second prior appeal,³ the Board issued a decision and order on June 2, 1997 in which it affirmed the September 24 and October 21, 1993, March 2 and May 26, 1994 decisions of the Office on the grounds that appellant had not met his burden of proof to establish that he had disability after February 5, 1991 due to his January 17, 1988 employment injury. The Board noted that, because the Office had properly terminated appellant's compensation effective February 5, 1991, the burden of proof shifted to appellant to show that he had disability after that date due to his January 17, 1988 employment injury. The Board reviewed the additional medical evidence submitted by appellant in support of his reconsideration request and determined that it did not contain sufficient probative value to show that he had employment-related disability after February 5, 1991.⁴

In the third appeal,⁵ the Board issued a decision and order on July 29, 2002 in which it reversed the July 20, 2000 decision of the Office on the grounds that the Office improperly denied appellant's request for reconsideration of his claim. The Board found that appellant submitted a March 16, 1998 report of Dr. Stephen J. Flood, an attending Board-certified orthopedic surgeon, which constituted new and relevant medical evidence and required reopening of his claim for merit review. The Board remanded the case to the Office for a proper review of appellant's claim on the merits to be followed by an appropriate decision. The facts and circumstances of the cases up to that point are set forth in the Board's prior decisions and are incorporated herein by reference.

In his March 16, 1998 report, Dr. Flood provided an extensive discussion of the medical evidence of record, including details of the findings on examination and diagnostic testing. He indicated that a discogram performed by Dr. Loupe on October 31, 1989 showed "abnormality and classic recreating pain at L5-S1" and was "among the most important piece[s] of information

² On January 17, 1988 appellant, then a 38-year-old mail carrier, sustained cervical and lumbar strains and temporary aggravation of degenerative disc disease of the lumbar spine when he was involved in a vehicular accident at work. In December 1990, the Office determined that there was a conflict in the medical evidence, regarding appellant's continuing employment-related disability, between Dr. Johnny V. Jenkins, an attending Board-certified orthopedic surgeon, and Dr. William F. Hagemann and Dr. Thad S. Broussard, Board-certified orthopedic surgeons, who served as physicians for the Office. The Office initially referred appellant to Dr. Jack F. Loupe, a Board-certified orthopedic surgeon, for an impartial medical examination. However, Dr. Loupe failed to adequately clarify his opinion when requested by the Office and the case was then referred to Dr. Nutik for an impartial medical examination.

³ Docket No. 94-2110 (issued June 2, 1997).

⁴ The Board noted that the July 12, 1993, January 5 and April 8, 1994 reports of Dr. James C. Butler, an attending Board-certified orthopedic surgeon, did not show that appellant had employment-related disability after February 5, 1991.

⁵ Docket No. 01-1157 (issued July 29, 2002).

among all the paperwork.”⁶ Dr. Flood indicated that he agreed with other attending physicians who determined that appellant sustained an employment-related injury at L5-S1 which continued to cause disability. He asserted that Dr. Nutik, the Board-certified orthopedic surgeon, who served as an impartial medical specialist, did not adequately explain his opinion that appellant ceased to have employment-related residuals. Dr. Flood suggested that Dr. Nutik’s opinion was incorrect because appellant continued to have lower back symptoms after the February 5, 1991 termination of his compensation. Dr. Flood suggested that the 1988 employment injury either caused or aggravated appellant’s degenerative disc disease and stated that it was “certainly within reasonable medical probability his current symptomatic degenerative disc disease is related to the work incident of 1988.”

After the Office’s July 20, 2000 decision denying his request for merit review, appellant submitted additional medical evidence in support of his claim. He submitted an August 16, 2000 report in which Dr. Loupe noted that he examined him on August 16, 2000 and found that his back motion was limited by pain.⁷ Dr. Loupe stated that appellant did not have any back problems prior to his January 17, 1988 employment injury and continued to have lower back pain since that date. He noted that appellant’s discograms showed an abnormal disc at L5-S1 and reproduction of chronic pain and stated that discograms represented the best form of testing for isolating such pain. Dr. Loupe indicated that appellant was only capable of “light employment” and stated:

“It was my opinion that his pain was arising from the L5-S1 disc. It was also my opinion that his L5-S1 disc had been injured and/or aggravated in the accident in question. Since he has continued to have unrelenting lower back pain ever since, it is only logical to assume that there was a permanent injury or aggravation to his lower back. Of course, degenerative change is likely also playing a part in his pain. There is no way of knowing whether this would have occurred without the accident having occurred. It is my opinion that the accident in question caused permanent injury and/or aggravation to his lower back problem.... This opinion is, of course, based on the findings of discography and [appellant’s] word that he has had continuous lower back pain ever since the injury of January 1988.”

On remand, the Office conducted a merit review of appellant’s claim to include review of the March 16, 1998 report of Dr. Flood. By decision dated January 10, 2003, the Office denied appellant’s claim on the grounds that he did not meet his burden of proof to establish that he had disability after February 5, 1991 due to his January 17, 1988 employment injury.

⁶ The record contains a copy of the discogram and shows that appellant had symptomatic degenerative disc disease at L5-S1. Dr. Flood indicated that a June 4, 1991 discogram obtained by Dr. Butler affirmed the findings of Dr. Loupe. The June 4, 1991 discogram also shows that appellant had symptomatic degenerative disc disease at L5-S1.

⁷ The Office initially referred appellant to Dr. Loupe in 1989 for an impartial medical examination. It appears that Dr. Loupe later served as an attending physician. Appellant submitted other documents including medical and administrative documents already of record and several brief medical status reports.

LEGAL PRECEDENT

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.⁸ The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁹ After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that he or she had an employment-related disability which continued after termination of compensation benefits.¹⁰

ANALYSIS

In the present case, the Board has previously determined that the Office met its burden of proof to terminate appellant's compensation, effective February 5, 1991, on the grounds that he had no disability after that date due to his January 17, 1988 employment injury, cervical and lumbar strains and temporary aggravation of degenerative disc disease of the lumbar spine. The Board found that the weight of the medical evidence rested with the February 5 and May 2, 1991 reports of Dr. Nutik, a Board-certified orthopedic surgeon, who served as an impartial medical specialist.¹¹ Therefore, it is not necessary for the Board to now consider the probative value of Dr. Nutik's opinion or the validity of the Office's termination effective February 5, 1991.¹² After the Office's proper termination of compensation effective February 5, 1991, the burden of proof shifted to appellant to show employment-related disability after that date.¹³ Moreover, it is not necessary for the Board to revisit the medical evidence it considered in its June 2, 1997 decision when it determined that the medical evidence appellant submitted after the February 5,

⁸ *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

⁹ *Id.*

¹⁰ *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

¹¹ Section 8123(a) of the Federal Employees' Compensation 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). 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. *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

¹² In the absence of further review by the Office on the issue addressed by a Board decision, the subject matter reviewed is *res judicata* and is not subject to further consideration by the Board. 5 U.S.C. § 8128; *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998). A decision of the Board is final upon the expiration of 30 days from the date of the decision. 20 C.F.R. § 501.6(d).

¹³ *See supra* note 10 and accompanying text.

1991 termination did not contain sufficient probative value to show that he had continuing employment-related disability.¹⁴

As noted above, the Board, in its July 29, 2002 decision, remanded the case to the Office for a merit review of appellant's claim after it determined that a March 16, 1998 report of Dr. Flood, an attending Board-certified orthopedic surgeon, constituted new and relevant medical evidence which required reopening of his claim. The Office then conducted a merit review of appellant's claim and found, by decision dated January 10, 2003, that appellant did not meet his burden of proof to establish that he had disability after February 5, 1991 due to his January 17, 1988 employment injury. The Board finds that the Office acted properly in this regard.

In his March 16, 1998 report, Dr. Flood emphasized that discograms which were performed on October 31, 1989 by Dr. Loupe, an attending Board-certified orthopedic surgeon¹⁵ and on June 4, 1991 by Dr. Butler, another attending Board-certified orthopedic surgeon, showed that he had degenerative disc disease at L5-S1 disc which was symptomatic. Dr. Flood suggested that appellant either sustained degenerative disc disease on January 17, 1988 or a permanent aggravation of a preexisting degenerative condition on that date.¹⁶ This report, however, is of limited probative value on the relevant issue of the present case in that Dr. Flood did not provide adequate medical rationale in support of his conclusion on causal relationship.¹⁷ The Office only accepted appellant's claim for temporary aggravation of degenerative disc disease, and Dr. Flood did not describe the employment injury in any detail or explain the mechanism by which it would continue to cause disability after February 5, 1991.

Moreover, Dr. Flood did not explain how the discograms showed that the January 17, 1988 employment injury continued to contribute to appellant's lower back problems. The test results merely indicated that appellant had abnormality and pain at L5-S1, but did not identify the specific cause for this condition. He suggested the fact that appellant continued to complain of lower back pain since January 17, 1988 showed a continuing employment-related contribution to his back condition, but the Board has held the fact that a condition manifests itself or worsens during a period of employment¹⁸ or that work activities produce symptoms revelatory of an underlying condition¹⁹ does not raise an inference of causal relationship between a claimed condition and employment factors. Dr. Flood failed to explain why appellant's continuing

¹⁴ For example, the Board determined that several reports of Dr. Butler, an attending Board-certified orthopedic surgeon, did not show that appellant had employment-related disability after February 5, 1991.

¹⁵ Appellant was referred to Dr. Loupe in 1989 for an impartial medical examination, but he later served as an attending physician. It should be noted that Dr. Nutik specifically addressed the October 31, 1989 discogram in his opinion.

¹⁶ Dr. Flood stated that it was "certainly within reasonable medical probability his current symptomatic degenerative disc disease is related to the work incident of 1988."

¹⁷ See *Leon Harris Ford*, 31 ECAB 514, 518 (1980) (finding that a medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale).

¹⁸ *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

¹⁹ *Richard B. Cissel*, 32 ECAB 1910, 1917 (1981).

condition was not solely due to his underlying degenerative disc disease or some other nonwork-related cause.

Appellant also submitted an August 16, 2000 report in which Dr. Loupe indicated that appellant had disability due to his January 17, 1988 employment injury after February 5, 1991. Dr. Loupe's report is of limited probative value for the same reasons that Dr. Flood's report is of limited probative value. Dr. Loupe also emphasized that discograms showed an abnormal disc at L5-S1 and reproduction of chronic pain. However, he also failed to explain how these test findings showed that the January 17, 1988 employment injury continued to contribute to appellant's lower back problems. Dr. Loupe claimed that appellant sustained permanent degenerative disc disease on January 17, 1988 or aggravation of a preexisting degenerative condition, but he did not adequately describe the mechanism of such an alleged injury. He also reported that appellant continued to complain of lower back pain since January 17, 1988, but as noted above the mere highlighting of continued symptoms would not be sufficient to establish causal relationship between employment factors and the claimed condition.²⁰

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he had disability after February 5, 1991 due to his January 17, 1988 employment injury.

²⁰ Appellant submitted other documents but these were either medical and administrative documents already of record or brief medical status reports which did not address the cause of his continuing medical problems.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 10, 2003 is affirmed.

Issued: August 3, 2004
Washington, DC

David S. Garson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member