

accepted his claim for HNP cervical spine¹ and paid compensation for temporary total disability on the periodic rolls.

Appellant's attending physician, Dr. Imad Y. Baghal, an orthopedic surgeon, reported on August 28, 2001 that appellant remained totally disabled for work. He recommended cervical discectomy and fusion but noted that appellant was not interested in having this surgery.²

On December 31, 2001 Dr. David Rubinfeld, an orthopedic surgeon and Office referral physician, reported a normal orthopedic examination. He stated that no objective findings related to the accepted condition were present and based on objective findings appellant's condition had resolved. Dr. Rubinfeld reported that appellant was not disabled for work and needed no further care.

Finding a conflict in medical opinion, the Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. Carl F. Mercurio, a Board-certified orthopedic surgeon, to resolve whether appellant had objective findings of the accepted cervical HNP and whether he remained disabled for work as a result.

In a report dated February 19, 2002, Dr. Mercurio related appellant's history of injury, medical treatment and current complaints. He reviewed his medical records and the statement of accepted facts. After reporting extensive findings on physical examination, Dr. Mercurio diagnosed cervical sprain, cervical herniated nuclei pulpous, lumbar sacral strain and contusion to the left thigh. He reviewed diagnostic studies and answered the questions posed by the Office:

"Aside from the MRI [magnetic resonance imaging] [scan] findings which did not change appreciably between December 27, 1999 and July 21, 2000. There is no objective medical evidence in my examination of loss of function or use. Reflexes were normal. There were no signs of nerve irritation. Manual muscle testing and grip strength was normal. Certainly an individual of 43 years old would have evidence of cervical spondylosis. It was not caused by the accident of December 13, 1999.

"I feel that no further treatment is necessary in relation to the accident of December 13, 1999. I base this upon my objective physical examination of no loss of function. The majority of [appellant's] complaints were subjective in nature and nonreproducible. Again there were no signs of nerve irritation. Reflexes were normal. Manual muscle testing was normal and grip strength was normal.

"In regards to the disability of December 13, 1999, enough time has passed and given enough treatment, the present examination reveals no objective findings. The majority of [appellant's] complaints are subjective in nature. I feel that he

¹ Appellant was diagnosed with an HNP at the C6-7 level.

² On December 15, 2000 the Office authorized a cervical laminectomy and discectomy, together with 120 days of post-op physical therapy, but the surgery was never performed.

could perform the full duties of federal employment as a window clerk as described in the admission description forwarded to me.

“These conclusions are within a reasonable degree of medical probability.”

In a decision dated April 15, 2002, after appropriate notice, the Office terminated appellant’s compensation benefits effective that date for the accepted condition of cervical HNP. The Office found that the weight of the medical evidence rested with the opinion of Dr. Mercurio and established that appellant no longer had disability for work or a continuing medical condition due to the injury of December 13, 1999.

Appellant requested an oral hearing before an Office hearing representative. He argued that the Office ignored the medical evidence of ongoing, severe, consequential, injury-related psychiatric disability and that Dr. Mercurio, an orthopedic surgeon, was not competent to address the issue. Appellant also argued that the Office violated his due process rights by not considering the evidence it had received in response to its notice of proposed termination. A hearing was held on February 26, 2003.

In a decision dated May 27, 2003, the Office hearing representative affirmed the termination of appellant’s compensation benefits for the accepted condition of cervical HNP. The hearing representative found that Dr. Mercurio’s well-reasoned opinion was the weight of the medical evidence with respect to the accepted work injury. The hearing representative also found that further development of the evidence was warranted on whether appellant developed an emotional condition as a result of the incident on December 13, 1999.

On appeal appellant argues that the Office erred in terminating his compensation benefits as there was sufficient evidence in the file that established or at minimum strongly indicated that he still suffered disability as a result of his injury-related psychiatric condition.

LEGAL PRECEDENT

It is well established that, 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

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.⁵

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).

⁵ *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

ANALYSIS

It is important in this case to clarify the nature of the Office's burden of proof. Having accepted appellant's claim for the condition of HNP cervical spine, the Office bears the burden of justifying the termination of compensation benefits for that medical condition. This burden does not extend to medical or psychiatric conditions yet to be accepted or yet to be established as work related; appellant maintains the burden of proof with respect to those conditions.⁶ Appellant argues on appeal that it was the Office's burden to prove that there was no residual disability resulting from his work injury on December 13, 1999 prior to terminating his benefits, a true description of the Office's burden so long as "work injury" is read to mean "accepted injury" or "accepted medical condition."⁷ In terminating benefits for the accepted condition of cervical HNP, the Office has no burden to establish that appellant's psychiatric condition has resolved or that any disability for work resulting there from has ceased, as the Office has not accepted that his psychiatric condition is causally related to the December 13, 1999 work incident.⁸

The Office properly referred appellant to an impartial medical specialist to resolve a conflict on whether his cervical HNP resolved without disability or need for further treatment. The Office provided Dr. Mercurio, a Board-certified orthopedic surgeon, with appellant's medical record and a statement of accepted facts. Based on appellant's history, extensive findings on examination and the information contained in the medical records provided, Dr. Mercurio determined with a reasonable degree of medical probability that no further treatment was necessary in relation to the accepted employment injury and that appellant could perform the full duties of his position as a window clerk. He reasoned that MRI scan findings had not changed appreciably, that there was no objective evidence of loss of function or use on examination, that the majority of appellant's complaints were subjective and not reproducible, that enough time had passed and that enough treatment was given. The Board finds that Dr. Mercurio's opinion is based on a proper factual and medical background and is sufficiently well reasoned that it is entitled to special weight in resolving the conflict in this case. As the weight of the medical opinion evidence justifies the termination of compensation benefits for the accepted condition of cervical HNP, the Board will affirm the Office's May 27, 2003 decision.⁹

⁶ See *Lucienne Savidan*, 4 ECAB 615 (1952) (where the disability for which the Office awarded compensation was not the same as the one the claimant now alleges and causal relationship of such disability to the employment incident has not been acknowledged by the Office, the burden is still on the claimant).

⁷ See 20 C.F.R. § 10.5(ee) (1999) (defining "traumatic injury" as a condition of the body caused by a specific event or incident or series of events or incidents, within a single workday or shift).

⁸ Because the Office has not issued a final decision on the issue of appellant's psychiatric condition, but has instead determined that further development of the evidence is warranted, the Board has no jurisdiction to consider the issue on this appeal. 20 C.F.R. § 501.2(c)

⁹ The Board notes that the hearing representative was able to review all the evidence appellant submitted to the Office in response to its notice of proposed termination of compensation.

CONCLUSION

The Board finds that the Office met its burden of proof to justify the termination of appellant's compensation benefits for the accepted condition of cervical HNP.

ORDER

IT IS HEREBY ORDERED THAT the May 27, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 3, 2004
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member