

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DENNIS L. PARKS and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Philadelphia, PA

*Docket No. 03-2013; Submitted on the Record;
Issued February 6, 2004*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation effective January 27, 2002; and (2) whether appellant met his burden of proof to establish that he had any disability after January 27, 2002 causally related to his employment injury.

On August 5, 1991 appellant, then a 43-year-old file clerk, filed a claim for traumatic injury alleging that on that date he strained a muscle in his left lower back, while picking up a large folder from a table. Appellant returned to light duty on August 28, 1991 and stopped work on July 13, 1992. The Office accepted appellant's August 5, 1991 thoracic and lumbar strains and a July 13, 1992 recurrence claim. On September 25, 1992 the Office placed appellant on the periodic rolls, effective August 22, 1992. Appellant has not returned to work.

The Office continued to develop the claim and in a report dated September 7, 1995, Dr. Stephen M. Horowitz, a Board-certified orthopedic surgeon and an Office second opinion physician, advised that he examined appellant that day and determined that he had no residuals of his work-related injury.

In a work restriction evaluation form dated August 27, 1997, Dr. A.E. Bogert, appellant's treating osteopath, stated that appellant had reached maximum medical improvement and was capable of working four hours a day with restrictions. In an impartial medical report dated November 19, 1997, Dr. Leonard Klinghoffer, a Board-certified orthopedic surgeon, noted that he had examined appellant on that day and advised that he had no work-related medical residuals and could return to work.

On January 22, 1998 the Office issued a notice of proposed termination of compensation stating that the evidence of record failed to establish that appellant had continuing residuals of his August 5, 1991 work-related injury.

In a report dated September 15, 1998, Dr. Bogert stated that appellant had been under his care since 1992 and that he was totally disabled with no expectation that he could return to the workplace. Dr. Bogert listed appellant's conditions as chronic and post-traumatic thoracolumbosacral strain and sprain with myofascitis, lumbar radiculitis, degenerative disc disease, aggravated degenerative joint disease and recurrent hip capsulitis and sacroiliitis. In a work restriction evaluation form dated that day, Dr. Bogert advised that appellant could return to limited duty for three hours a day.

On April 30, 1999 the Office referred appellant to Dr. E. Michael Orkin, a Board-certified orthopedic surgeon, to resolve the conflict between Dr. Bogert and Dr. Klinghoffer. In an amended statement of accepted facts, the Office noted that Dr. Bogert advised in 1997, that appellant could work up to four hours a day but that in 1998, he stated that appellant could work only three hours a day. The Office also noted that the conflict in medical opinion was between Dr. Bogert and Dr. Klinghoffer, the impartial medical examiner.

In a report dated May 20, 1999, Dr. Orkin examined appellant that day and determined that he had no work-related residuals and was able to return to work.

On October 2, 2000 the Office issued a notice of proposed termination of compensation and on November 17, 2000 terminated appellant's compensation on the grounds that he was no longer disabled from work as a result of his work-related injury. On December 13, 2000 appellant, through counsel, requested an oral hearing.

In an April 5, 2001 decision, an Office hearing representative set aside the Office's November 17, 2000 decision and remanded the case to the Office for referral to another impartial medical examiner. The hearing representative stated that because Dr. Orkin's report did not provide a rationalized medical opinion to support his conclusion that appellant had no work-related disability, it was insufficient to support the Office's termination decision. The Office thereupon referred appellant to Dr. William H. Simon, a Board-certified orthopedic surgeon, for an impartial medical evaluation to determine whether claimant had any medical residuals relating to his work-related injury.

On November 8, 2001 Dr. Simon stated that he had examined appellant that day and advised that he had no residuals of his work-related injury and was capable of returning to a light-duty position for eight hours a day. Dr. Simon noted on the following day that he had reviewed appellant's medical records. In a November 29, 2001 supplemental report, Dr. Simon stated that appellant's degenerative disc disease and degenerative joint disease of the lumbar spine were not causally related to the accepted injury.

On December 13, 2001 the Office again issued a notice of proposed termination of compensation on the grounds that the medical evidence established that appellant had no residuals from his work-related injury.

Subsequent to the notice, appellant submitted a March 15, 2001 report from Dr. Norman B. Stempler and reports dated April 27 and December 18, 2001 and January 2, 2002 from Dr. Bogert.

By decision dated January 17, 2002, the Office terminated appellant's compensation benefits effective January 27, 2002. Appellant again requested an oral hearing. A hearing was held on September 26, 2002 and on December 2, 2002 an Office hearing representative affirmed the January 17, 2002 termination decision.

By letter dated February 19, 2003, appellant requested reconsideration. In support of his request, appellant submitted treatment notes from March to December 20, 2002, as well as a December 17, 2002 report from Dr. Bogert. By decision dated May 16, 2003, the Office denied modification of its previous decision denying benefits.

The Board finds that the Office met its burden of proof when it terminated appellant's compensation and medical benefits in a decision dated January 17, 2002, on the basis that appellant no longer had residuals as a result of his work-related injury.

It is well established that once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment. Thus, the burden of proof is on the employee, rather than the Office with respect to the period subsequent to the date when compensation is terminated or modified.¹

In this case, an Office hearing representative determined that, following the November 17, 2000 termination decision, the report of an impartial medical examiner was insufficient to establish that appellant had no medical residuals of his work-related injury and remanded the case for further development.

In noted reports of record, appellant's treating osteopath, Dr. Bogert, supported that appellant had an ongoing condition related to the work injury. However, Dr. Klinghoffer, an impartial medical examiner, found that appellant had no residuals of his accepted injuries and was capable to work light duty.

Section 8123(a) of the Federal Employees' Compensation Act provides that, "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."²

Given the conflict in the medical evidence, the Office properly referred appellant to Dr. Simon for an impartial medical evaluation. Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently reasoned upon a proper factual background, must be given special weight.³ The Office relied on the opinion of Dr. Simon, a Board-certified orthopedic surgeon, selected to act as an impartial medical examiner, who, in reports dated November 8, 9 and 29, 2001, concluded that appellant

¹ *Eddie Franklin*, 51 ECAB 223 (1999).

² 5 U.S.C. § 8123.

³ *Roger Dingess*, 47 ECAB 123 (1995).

had no continuing work-related condition and that he was capable of performing restricted work duties.

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Simon. The physician reviewed appellant's complaints, his medical history, including the August 5, 1991 work-related injury, conducted a physical examination, compared appellant's condition to prior examinations and compared current and prior magnetic resonance imaging (MRI) scans and x-rays. Dr. Simon noted normal orthopedic physical examination findings and noted upon review of x-rays taken that day that appellant had degenerative disc disease at L5 and degenerative joint disease of the lumbar spine. However, he advised that these conditions were of long standing as revealed by prior medical reports and had no relationship to the work-related injury. Dr. Simon stated that there were no objective findings as a result of his physical examination, neurological examination, appellant's 1999 MRI scan or x-rays taken that day to establish that appellant sustained an injury on August 5, 1991 sufficient to keep him from returning to his job as a clerk. He advised that appellant could work with restrictions limiting him to bending from the waist or lifting over 15 pounds. In a separate November 9, 2001 report, he noted that appellant's 1992 MRI scan revealed severe long-standing degenerative disc disease at L4-5 and L5-S1, which was confirmed by July 13, 1992 x-rays and had long-standing back symptoms since 1970. The physician concluded that he was unable to identify objective evidence of "a residuum of trauma of the accident of August 5, 1991."

The Office correctly found that the weight of the medical evidence rested with the independent medical opinion of Dr. Simon as it was sufficiently probative, rationalized and based upon a proper factual background. Therefore, the Office acted correctly in according the opinion of Dr. Simon the special weight of an impartial medical examiner and terminated appellant's benefits effective January 27, 2002.⁴

With his reconsideration request, appellant submitted new medical evidence from Dr. Bogert consisting of treatment notes from March to December 20, 2002 as well as a December 17, 2002 report from Dr. Bogert. His December 17, 2002 report did not contain countervailing, probative medical evidence that appellant continued to have residual disability from his work-related injury. Dr. Bogert, whose opinion represented one side of the conflict, resolved by Dr. Simon's impartial medical report, merely reiterated his opinion that appellant's conditions were related to his work-related injury.

As the Office met its burden of proof to terminate appellant's compensation benefits, the burden shifted to appellant to establish that he had disability causally related to his accepted injury.⁵ To establish a causal relationship between the condition as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence based on a complete medical and factual background, supporting such a causal relationship.⁶ Causal relationship is a medical issue and the medical evidence required to

⁴ *Gary R. Seiber*, 46 ECAB 215 (1994).

⁵ *Manuel Gill*, 52 ECAB 282 (2001).

⁶ *Id.*

establish a causal relationship is rationalized medical evidence.⁷ Rationalized medical evidence is evidence, which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medial rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁸ Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.⁹

Dr. Bogert's medical reports from March 6 to December 12, 2002 did not include a rationalized medical opinion establishing a causal relationship between his condition and his employment. In his December 17, 2002 report, Dr. Bogert notes his disagreement with Dr. Simon and opines that appellant's pain was caused by fibrosis of the injured muscles, inflammation, abnormal spinal mechanics and deconditioning. The physician related appellant's pain to his work-related injury of August 5, 1991, which suggested a traumatic cause of his complaints. This report is insufficient to establish continuing disability because the physician did not explain whether appellant was disabled and if so, how it was related to his August 5, 1991 work-related injury. Although he related appellant's subjective complaints of pain, he did not support his conclusion with rationalized medical opinion evidence that his pain was caused by the work-related injury, nor did he determine that his pain rendered him disabled from work.

⁷ *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

⁸ *Leslie C. Moore*, 52 ECAB 132 (2000).

⁹ *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

The decisions of the Office of Workers' Compensation Programs dated May 16, 2003 and December 2, 2002 are hereby affirmed.

Dated, Washington, DC
February 6, 2004

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member