

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROSS L. FULLER and DEPARTMENT OF THE ARMY,
Fort Hood, TX

*Docket No. 03-279; Submitted on the Record;
Issued January 14, 2004*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits.

On July 18, 1983 appellant, a 44-year-old aircraft mechanic, injured his lower back while attempting to stabilize a helicopter being towed off a runway. He filed a claim for benefits on August 2, 1983, which the Office accepted for lumbar strain. Appellant missed work intermittently and was paid compensation by the Office for appropriate periods. He performed light duty intermittently until January 17, 1984, when he stopped working. The Office placed appellant on the periodic rolls.

Appellant received continuing treatment from several physicians. In a report dated October 31, 1995, Dr. Timothy L. Keenen, an attending physician Board-certified in orthopedic surgery, related appellant's complaints of continued back pain and bilateral lower extremity symptoms. He attributed these symptoms to appellant's L4-5 spondylolisthesis, which he stated was probably related to his original 1983 injury.

In order to determine appellant's current condition, the Office scheduled a second opinion examination with Drs. Phaon Gambee, a Board-certified orthopedic surgeon, and Dr. David Gardner, a Board-certified neurologist. In a report dated December 27, 1995, Drs. Gambee and Gardner reviewed appellant's medical records and a statement of accepted facts and indicated findings on examination. Drs. Gambee and Gardner advised that appellant's current lumbar spine condition did not reflect the residuals of his July 28, 1983 employment incident; they believed that the major contributing cause of his condition, by contrast, was factors such as age and obesity, which produced a progressive, degenerative spondylolisthesis at L4-5. Drs. Gambee and Gardner concluded that there was no objective evidence that appellant had physical limitations due to the 1983 employment injury. In an opinion dated January 22, 1996, Dr. Keenen expressed his disagreement with the opinions of Drs. Gambee and Gardner, and reiterated his previously stated opinion that appellant's degenerative lumbar pain was related to the 1983 employment injury.

On December 16, 1997 the Office determined a conflict existed in the medical evidence between the opinion of Dr. Keenen, appellant's treating physician, and the opinion of Drs. Gambee and Gardner as to whether appellant had any continuing, residual disability in his low back causally related to his July 28, 1983 employment injury, and referred him for a referee medical examination with Dr. Clyde Hunt pursuant to section 8123(a) of the Federal Employees' Compensation Act.¹

In a report dated January 6, 1998, Dr. Hunt advised that, although he could not state his opinion with absolute certainty, he was inclined to agree with Dr. Keenen's conclusions in light of the fact that appellant had been experiencing back pains since the injury of July 28, 1983. He stated that it was "more probably than not" that appellant had a propensity to have degenerative disc disease and degenerative joint disease in his low back. Dr. Hunt advised that there appeared to be a pathological worsening of these tendencies on July 28, 1983, which had in fact contributed to the degenerative changes in his back and attendant need for treatment to date. He also stated that appellant had no measurable physical limitations, but felt that he would have trouble doing more than light to sedentary work, as Dr. Keenen also believed.

In a March 12, 1998 supplemental report, Dr. Hunt stated that he was unsure of the significance indicated by a magnetic resonance imaging (MRI) scan and other diagnostic tests appellant underwent. He further advised that he was unable to state with certainty the degree to which appellant was currently affected by residuals from his 1983 employment injury, or whether his preexisting condition was pathologically worsened by the 1983 work injury.

In a September 28, 1999 report, Dr. Keenen noted that the results of a November 19, 1997 physical capacity evaluation indicated that, on an objective basis, appellant was capable of working 8 hours per day for 40 hours per week. He stated, however, that subjectively appellant was not capable of working on those terms. Dr. Keenen related that appellant asserted that, when he works full time, he experiences a flare-up of symptoms for one to three days thereafter, and is rendered unable to work. Dr. Keenen indicated that he had no objective findings to substantiate these subjective complaints of appellant.

The Office referred appellant for an examination with Dr. Thad C. Stanford, an orthopedic surgeon, who stated in a November 1, 1999 report that appellant had no residuals from the July 18, 1983 low back strain.² Dr. Stanford opined that he did not believe appellant was disabled from a physical standpoint, although he advised that after being out of work for 16 years appellant was probably convinced that he was unable to work anymore. Dr. Stanford felt that he was unable to relate appellant's current complaints of pain to the 1983 lumbar strain and was not even certain that they were related to his degenerative arthritis, although given his lack of conditioning and obesity were more likely to give him pain than a strain he sustained 16 years ago.

¹ 5 U.S.C. § 8123(a).

² The Office referred appellant to Dr. Stanford after determining that Dr. Hunt did not provide sufficient medical reasoning to support a causal relationship between appellant's 1983 employment injury and his accepted lumbar strain condition.

In a notice of proposed termination dated May 11, 2000, the Office found that the weight of the medical evidence, represented by the opinions of Drs. Keenen and Stanford, demonstrated that appellant no longer had any residuals from the July 28, 1983 employment-related low back injury.

On September 28, 2000 the Office scheduled appellant for an examination with Dr. William Thieme, a Board-certified orthopedic surgeon.

In a report dated October 20, 2000, Dr. Thieme, after stating findings on examination and reviewing the statement of accepted facts and medical history, opined that appellant's lumbar spine condition was probably not related to residuals of his July 28, 1983 employment injury. Dr. Thieme advised that even a severe lumbar sprain would have been expected to have resolved over a period of two to three months. He stated that, as a consequence, appellant's current back condition was not the direct consequence of an apparent mild low back injury in July 1983, and concluded that there were no objective findings to suggest any physical limitations stemming from the 1983 employment injury. Dr. Thieme advised that appellant's current mild limitation of motion, straight leg raising and abnormalities on x-rays could not reasonably be considered to be consequences of the 1983 low back injury.

By decision dated November 14, 2000, the Office terminated appellant's compensation, finding that the weight of the medical evidence, as represented by Dr. Thieme's opinion, established that there were no objective findings of lumbar strain residuals from the 1983 injury and that he no longer had residuals of his July 28, 1983 employment injury.

By letter dated November 28, 2000, appellant requested a review of the record before an Office hearing representative.

By decision dated June 14, 2001, based on a review of the written record, an Office hearing representative set aside the November 14, 2000 Office decision. The hearing representative found that Dr. Thieme's opinion, on which the decision was based, was not fully rationalized because he did not address Dr. Keenen's statement that the 1983 employment injury impacted appellant's underlying degenerative disc condition. The hearing representative therefore remanded the case and instructed the district Office to ask Dr. Thieme to provide an addendum report in order to clarify whether appellant's lumbar degenerative condition was impacted, caused or aggravated or resulted from the 1983 work injury.

In a supplemental report dated August 9, 2001, Dr. Thieme stated:

"I believe [appellant's] spondylosis/spondylolysis and disc degeneration were preexisting conditions which were most probably not changed by the lumbar strain in 1983. Therefore, they were not caused by that injury. Further, I do not believe that the incident caused any lasting aggravation of his preexisting condition."

In a notice of proposed termination dated December 11, 2001, the Office, based on the opinion of Dr. Thieme, found that the weight of the medical evidence demonstrated that appellant no longer had any residuals from the accepted July 28, 1983 low back injury.

By letter dated January 7, 2002, appellant contested the proposed termination of compensation. He submitted a June 8, 2000 medical report from Dr. Jerry Boggs, Board-certified in neurology and psychology; a January 2, 2002 report from Dr. Anthony L. Glassman, and normal nerve conduction studies dated July 22, 1985 from Dr. Cary R. Sternick, Board-certified in neurology and psychology.

In his report, Dr. Boggs stated findings on examination, discussed appellant's medical history, and stated:

"I suspect that the majority of [appellant's] lower back pain is mechanical/musculoskeletal in nature as a result of his injury back in 1983. Although he does have symptoms that are somewhat reminiscent of irritation of the L5 nerve roots, there are not objective abnormalities on examination to substantiate this. The only mechanism that I can come up with by which he may have had injury to these nerves is that during his initial accident he experienced significant traction or compression of these nerves transiently, resulting in some permanent neural damage but not significant enough to cause any chronic motor findings. Given the nature of his normal neurologic examination at this point including strength, I do not feel that electromyography, especially given the duration of time that has passed, would result in any objective abnormalities.

Dr. Glassman stated in his January 2, 2002 report that he agreed with Dr. Boggs' opinion to the extent that appellant had symptoms suggestive of L5 and/or S1 nerve root irritation with a paucity of objective findings on examination.

By decision dated February 14, 2002, the Office terminated appellant's compensation, finding that the weight of the medical evidence, as represented by Dr. Thieme's opinion, established that appellant no longer suffered from residuals of his 1983 employment injury.

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order 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 *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

⁴ *Id.*

In the present case, the Office properly based its decision to terminate appellant's compensation for his low back injury on Dr. Thieme's well-rationalized opinion.⁵ Dr. Thieme initially advised in his October 20, 2000 report that appellant's lumbar spine condition was probably not causally related to residuals of the 1983 work injury. He stated that appellant's current mild limitation of motion, straight leg raising and abnormalities on x-rays could not reasonably be considered to be consequences of the 1983 low back injury. Dr. Thieme explained that even a severe lumbar sprain would have been expected to have resolved over a period of two to three months and that, therefore, as a result, appellant's current back condition was not the direct consequence of an apparent mild low back injury in July 1983. He concluded that there were no objective findings to suggest any physical limitations stemming from the 1983 employment injury. In his August 9, 2001 supplemental report, Dr. Thieme explicitly stated that appellant's spondylosis/spondylolysis and disc degeneration were preexisting conditions which were most likely not affected by the 1983 lumbar strain, and were therefore not caused by that injury. Dr. Thieme further advised that the 1983 incident did not cause any lasting aggravation of his preexisting condition. These two reports, taken together, constitute probative, rationalized medical evidence sufficient to establish that appellant no longer experienced residuals stemming from his accepted 1983 employment injury. Dr. Thieme, after stating findings on examination, reviewing the statement of facts, appellant's medical history and the diagnostic tests of record, definitively rejected any lingering causal connection between the 1983 work injury and appellant's current condition; thus, the Office properly found that Dr. Thieme's opinion constituted the weight of the medical evidence in terminating appellant's compensation.

Although appellant submitted additional medical evidence subsequent to the Office's proposed termination of compensation, these reports are not sufficient to create a conflict in the medical evidence. Both Dr. Boggs and Dr. Glassman stated generally that the majority of appellant's lower back pain resulted from his 1983 employment injury back in 1983 and that his symptoms were suggestive of nerve root irritation at the L5 or S1 level, but both physicians agreed that these symptoms were not substantiated by any objective findings. The opinions of Drs. Boggs and Glassman regarding causal relationship are of limited probative value in that they did not provide adequate medical rationale in support of their conclusions.⁶ They did not describe appellant's 1983 accident in any detail or how the accident would have been competent to cause lingering residuals in his lower back. Moreover, the opinions of Drs. Boggs and Glassman are of limited probative value for the further reason that they are generalized in nature and equivocal in that they only noted summarily that appellant's current condition is causally related to the July 18, 1983 employment injury. Thus, the Office correctly found that the weight of the medical evidence was represented by Dr. Thieme's opinion.

⁵ The Board notes that the Office erred in designating Dr. Thieme as a referee medical specialist. The Office determined that there was a conflict in the medical evidence between Dr. Hunt and Dr. Stanford regarding whether appellant continued to have residuals from the 1983 employment injury, and whether his current back complaints were causally related to the 1983 injury. However, the Act and the Federal (FECA) Procedure Manual stipulate that such a conflict must necessarily arise between an Office referral physician and an attending physician. See 5 U.S.C. § 8123(a); Federal (FECA) Procedural Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence: Sources of Medical Evidence*, Chapter 2.810.5(e) (September 1993). As Dr. Hunt was himself a referee medical examiner, no such conflict existed at the time of Dr. Thieme's referral. Dr. Thieme's opinion, therefore, must be considered that of an Office referral physician.

⁶ *William C. Thomas*, 45 ECAB 591 (1994).

Accordingly, the decision of the Office of Workers' Compensation Programs dated February 14, 2002 is affirmed.

Dated, Washington, DC
January 14, 2004

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member