

Appellant stopped work on December 2, 1989, had intermittent periods of disability during February 8 to April 26, 1990 and total disability from April 27 to July 31, 1990. In an October 3, 1990 letter, the Office authorized wage-loss compensation through September 22, 1990 and placed appellant on the automatic rolls for total disability effective September 23, 1990.

In a January 29, 2001 report, Dr. Fred Blackwell, an attending Board-certified orthopedic surgeon, initially noted that he had not seen appellant in two years. Regarding appellant's work ability, Dr. Blackwell opined that from a lower back perspective he was capable of working one to two hours with restrictions, but that he currently was unable to work due to cardiac problems.

In an October 23, 2001 report, Dr. Jerrold M. Sherman, a second opinion Board-certified orthopedic surgeon, noted that, based upon an August 23, 2001 magnetic resonance imaging scan, appellant had degenerative disc disease at L4-5 and L5-S1 and some right nerve impingement at the root at L4-5 level. Based upon a review of appellant's job description, Dr. Sherman concluded that appellant was capable of performing the duties listed in his date-of-injury job description. He concluded that appellant was capable of working eight hours with restrictions on sitting, no repetitive bending or crouching and no lifting more than 20 pounds.

Dr. Blackwell, in a November 29, 2001 report, diagnosed degenerative disc disease, chronic lumbosacral sprain/strain and disc protrusion at L4-5, herniated disc at L4-5 and probable nerve root compromise at L4, L5 and S1. Regarding appellant's work capability, Dr. Blackwell stated that he had reviewed Dr. Sherman's report and disagreed with the conclusion that appellant was capable of performing his date-of-injury job or working eight hours per day with restrictions. In support of this opinion, Dr. Blackwell noted that appellant had not worked since 1989, and had a heart transplant in 2000, and thus, was "clearly not conditioned to return to gainful employment at this time."

On January 11, 2002 appellant was referred to Dr. Thomas D. Schmitz, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Blackwell and Dr. Sherman, regarding appellant's permanent work injury residuals and whether appellant was capable of working eight hours per day or performing his date-of-injury job.

In a report dated February 6, 2002, Dr. Schmitz, based upon a review of the medical and factual evidence, a physical examination and statement of accepted facts, diagnosed status post cardiac transplant and lumbar degenerative disc disease. A physical examination revealed appellant had 10 degrees of extension, tenderness over the right SI joint, no sensory loss in the lower extremities and equal reflexes. Regarding appellant's work capability, he opined that appellant was capable of performing his date-of-injury position from a musculoskeletal standpoint. However, from a cardiac standpoint, which is unrelated to the accepted employment injury, appellant is disabled from performing this position.

In a March 27, 2002 supplement report, Dr. Schmitz noted that he found no evidence of a preexisting lumbar degenerative disc disease and that the loss of disc space at L5 "would be considered due to age-related and weight-related degenerative changes."

After reviewing a February 28, 2002 computerized tomography (CT) scan, Dr. Schmitz opined in an April 2, 2002 report, that appellant had no permanent residuals due his accepted employment injury. He further concluded that the findings on the CT scan are age related. Dr. Schmitz opined that the employment injury had aggravated appellant's preexisting lumbar degenerative disc condition.

On May 2, 2002 the Office issued a notice of proposed termination of compensation based upon the opinion of Dr. Schmitz.

The Office received a June 24, 2002 addendum from Dr. Schmitz, in which he concluded that appellant had no disability or any residuals due to his accepted employment injury.

On August 20, 2002 the Office referred appellant to Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Schmitz and Dr. Blackwell as to whether appellant suffered any permanent residuals from his accepted December 1, 1989 employment injury.

In a September 23, 2002 report, Dr. Swartz, based upon a review of the medical and factual evidence, statement of accepted facts and physical examination, concluded that appellant recovered from his accepted employment injury on December 1, 1990 and, thus, appellant did not require or need any further medical treatment. A physical examination revealed no atrophy and "several inconsistencies, which included give way or collapsing weakness with strength testing in the right lower extremity, which would be a response that would have no medical basis or medical validity." Regarding appellant's lumbar spine, the physician found "no verifiable evidence that there was a clinical problem" due to "the lack of objective findings from 1990 through the present time." Dr. Swartz reported that appellant had small disc herniations, but they did not appear disabling and were unrelated to the December 1, 1989 employment injury. He opined that appellant might have had a temporary aggravation of a preexisting disc herniation, but any aggravation caused by the injury would have ceased by December 1, 1990. Lastly, Dr. Swartz concluded that appellant had no permanent residuals or objective findings to support any condition due to the accepted December 1, 1989 employment injury. He opined that any current disability or impairment is due to the nonemployment-related heart transplant and cardiac problems.

On October 8, 2002 the Office issued a proposed termination of wage-loss and medical benefits based upon the opinion of Dr. Swartz, the impartial medical examiner, that he no longer had any residuals or disability due to his accepted December 1, 1989 employment injury.

In response to the proposed termination, appellant submitted an October 15, 2002 report by Dr. Blackwell. In his report, Dr. Blackwell disagreed with Dr. Swartz's opinion that appellant did not have any permanent injury or disability due to the accepted December 1, 1989 employment injury.

On November 15, 2002 the Office finalized the termination of appellant's compensation benefits.

In a letter dated November 25, 2002, appellant requested an oral hearing, which was held on May 14, 2003.

In an April 4, 2003 report, Dr. Blackwell disagreed with Dr. Swartz's opinion that appellant had no residuals from his accepted employment injury. Dr. Blackwell opined that appellant's current disability is due to both his cardiac problems and his "ongoing back problem that has not been sufficiently physically rehabilitated." He recommended vocational rehabilitation to assist appellant "while he undergoes physical rehabilitation and conditioning in anticipation of resuming work."

By decision dated August 5, 2003, the hearing representative affirmed the termination of appellant's wage-loss and medical compensation benefits on the basis that he no longer had any disability or residuals due to his accepted employment injury.

LEGAL PRECEDENT

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.¹ 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.² To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.³

ANALYSIS

In the instant case, the Office initially found a conflict in the medical opinion based upon the opinions of Dr. Blackwell, appellant's attending Board-certified orthopedic surgeon and Dr. Sherman, a Board-certified orthopedic surgeon and Office referral physician. Dr. Blackwell concluded that appellant was incapable of performing his date-of-injury job with restrictions due to both industrial and nonindustrial-related conditions. Dr. Sherman, however, concluded that appellant was capable of working eight hours with restrictions and was capable of performing his date-of-injury job. Thus, the Office properly referred appellant to Dr. Schmitz to resolve the conflict in the medical opinion evidence on the issue of whether appellant was capable of working eight hours per day and performing his date-of-injury job. Dr. Schmitz concluded that appellant was capable of returning to work and also found that appellant had no residuals due to the accepted December 1, 1989 employment injury. Dr. Blackwell, appellant's attending physician, concluded that appellant had permanent residuals from his employment injury. At the time of the referral to Dr. Schmitz there was no conflict in the medical opinion evidence regarding whether appellant continued to have residuals from his employment injury, as the second opinion physician did not address the issue of whether appellant had any residual disability due to his accepted employment injury. Therefore, Dr. Schmitz's report is not entitled to special weight on this issue. The Office properly determined that Dr. Schmitz could not be considered as an impartial medical examiner on the issue of whether appellant had any residual

¹ *Paul L. Stewart*, 54 ECAB ____ (Docket No. 03-1107, issued September 23, 2003).

² *Elsie L. Price*, 54 ECAB ____ (Docket No. 02-755, issued July 23, 2003).

³ *James F. Weikel*, 54 ECAB ____ (Docket No. 01-1661, issued June 30, 2003).

disability due to his accepted employment injury, but was an Office referral physician due to the new conflict in the medical opinion evidence caused by Dr. Schmitz's opinion that appellant had no residuals due to his accepted employment injury.⁴ Therefore, the Office properly referred appellant to an impartial medical examiner, Dr. Swartz. As previously stated, the impartial medical examiner reported on September 23, 2002 that, despite appellant's ongoing subjective complaints, there was no evidence of any objective abnormalities.

The Board finds that the Office properly relied on the impartial medical examiner's September 23, 2002 report as a basis for terminating benefits. Dr. Swartz's opinion is sufficiently well rationalized and based upon a proper factual background. He not only examined appellant, but also reviewed appellant's medical records. Dr. Swartz also reported accurate medical and employment histories. In his September 23, 2002 report, he stated that the objective evidence failed to establish any clinical problem with appellant's lumbar spine from 1990 to the present. Dr. Swartz reported that appellant had small disc herniations, which were unrelated to the December 1, 1989 employment injury and did not appear disabling. He further opined that appellant might have had a temporary aggravation of a preexisting disc herniation, but that any aggravation would have ceased by December 1, 1990. In concluding, Dr. Swartz opined that there was no objective evidence supporting any condition due to the December 1, 1990 employment injury and there were no permanent residuals. The Office properly accorded determinative weight to the impartial medical examiner's September 23, 2002 findings.⁵ Accordingly, the Board finds that the Office met its burden of proof in terminating appellant's wage-loss compensation and medical benefits.

Appellant disagreed with this proposed termination of compensation and submitted an October 15, 2002 report from Dr. Blackwell, which noted his disagreement with Dr. Swartz's conclusion and reiterated his opinion that appellant continued to have residual disability due to his December 1, 1989 employment injury. The Board notes, however, that Dr. Blackwell was on one side of the conflict in medical opinion created in this case and that his October 15, 2002 report essentially repeated his earlier conclusion that appellant continued to be disabled due to his December 1, 1989 employment injury.

The Board has frequently explained that an additional report from appellant's physician, which essentially repeated his earlier findings and conclusions, is insufficient to overcome the weight accorded the impartial medical examiner's report, where appellant's physician had been on one side of the conflict in medical opinion that the impartial medical examiner resolved.⁶ As

⁴ *Joseph Roman*, 55 ECAB ____ (Docket No. 03-1883, issued January 8, 2004) (A physician was properly an impartial medical specialist with respect to the issue in conflict, the need for surgery, at the time appellant was referred to him. However, there was no medial conflict regarding appellant's disability for work at the time of the referral; therefore, the specialist was not an impartial medical specialist on other issues and his report was not entitled to special weight on these other issues).

⁵ 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. *Sharyn D. Bannick*, 54 ECAB ____ (Docket No. 03-567, issued April 18, 2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

⁶ *Thomas Bauer*, 46 ECAB 257 (1994); *Virginia Davis-Banks*, 44 ECAB 389 (1993).

Dr. Swartz resolved the conflict in medical opinion, the additional report from Dr. Blackwell was insufficient to overcome the weight accorded the report of the impartial medical specialist.⁷

Following the November 15, 2002 decision, terminating appellant's compensation benefits, appellant requested an oral hearing and an April 4, 2003 report by Dr. Blackwell. In this report, he opined that appellant was disabled to both his heart condition and to his "ongoing back problem that has not been sufficiently physical[ly] rehabilitated."

The Board finds that the April 4, 2003 report of Dr. Blackwell, is insufficient to overcome the weight accorded to Dr. Swartz's September 23, 2002 report or to create a new conflict with it as Dr. Blackwell was on one side of the conflict that Dr. Swartz was selected to resolve.⁸ Therefore, the Office hearing representative's August 5, 2003 decision affirming the Office's November 15, 2002 termination of appellant's compensation benefits was proper. Dr. Swartz was the impartial medical specialist selected to resolve a conflict in the medical evidence and his well-rationalized opinion based upon a complete and accurate medical history was entitled to special weight.

CONCLUSION

The Board finds that the Office properly terminated appellant's wage-loss and medical benefits on the basis that he no longer had any disability or residuals due to his accepted December 1, 1989 employment injury.

⁷ *Daniel F. O'Donnell, Jr.*, 54 ECAB ____ (Docket No. 02-1468, issued February 28, 2003).

⁸ *See Dorothy Sidwell*, 41 ECAB 857, 874 (1990).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 5, 2003 is affirmed.

Issued: July 2, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member