

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**REED KISER, Appellant** )

and )

**DEPARTMENT OF LABOR, MINE SAFETY &  
HEALTH ADMINISTRATION, Pikeville, KY,  
Employer** )  
\_\_\_\_\_ )

**Docket No. 05-371  
Issued: May 17, 2005**

*Appearances:*  
*Reed Kiser, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chairman  
DAVID S. GERSON, Alternate Member  
MICHAEL E. GROOM, Alternate Member

**JURISDICTION**

On November 30, 2004 appellant filed an appeal from a May 12, 2004 merit decision of the Office of Workers' Compensation Programs finding that he had no employment-related condition after September 30, 2002 and a decision of a hearing representative dated November 4, 2004 affirming that his accepted condition resolved as of that date. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether the Office properly determined that appellant had no further employment-related condition after September 30, 2002.

**FACTUAL HISTORY**

On September 15, 2002 appellant, then a 57-year-old coal mine inspection supervisor, filed an occupational disease claim alleging that he sustained arthritis due to crawling and

walking “bent over in a crouching form in mud and water in coal mines” from February 1975 through September 2002. Appellant retired on September 30, 2002.

By decision dated December 23, 2002, the Office denied the claim on the grounds that appellant had not established a medical condition due to the accepted employment factors. Following a review of the written record, in a decision dated May 12, 2003, a hearing representative set aside the Office’s May 12, 2003 decision and remanded the case for a second opinion examination regarding whether appellant sustained arthritis causally related to his employment.

In a report dated August 14, 2003, the second opinion specialist Dr. Anbu K. Nadar, a Board-certified orthopedic surgeon, diagnosed early osteoarthritis of the joints of the upper and lower extremities aggravated by his employment. He related, “The aggravation of the claimant’s medical condition during the course of his employment in my opinion, would be a temporary aggravation. His symptoms should improve once the aggravating condition has been removed.”

Based on the opinion of Dr. Nadar, on August 20, 2003 the Office accepted appellant’s claim for a temporary aggravation of osteoarthritis of the bilateral knees, shoulders and hands. In a decision dated August 20, 2003, the Office found that the evidence failed to show that his employment contributed to his condition subsequent to his retirement on September 30, 2002.

On August 24, 2003 appellant requested a review of the written record by an Office hearing representative. He submitted a report dated September 14, 2003 from his attending physician, Dr. Brenda J. Baker, Board-certified in family practice, who noted that the Office had accepted appellant’s claim for a temporary aggravation of osteoarthritis based on Dr. Nadar’s report. She stated:

“As stated in my letter to you dated February 26, 2003, I believe that [appellant’s] complaints are directly related to his employment. I have seen [him] since he has retired. Indeed, his symptoms have not improved and he continues to suffer from the pain and discomfort that his osteoarthritis causes. He continues to require medical treatment for his condition.

“The pathophysiologic progress of osteoarthritis is usually progressive. However, it is true that on rare occasions [it] can stop or reverse. Yet, since [appellant] continues to have symptoms requiring treatment, I believe that his arthritis has neither stopped nor reversed. Therefore, the before referenced ‘temporary aggravation’ has continued until this day, almost one year since he ceased to be employed.”

In a decision dated January 30, 2004, the hearing representative set aside the Office’s August 20, 2003 decision after finding that Dr. Nadar had not specifically opined that the temporary aggravation of appellant’s osteoarthritis stopped by September 30, 2002. He instructed the Office, on remand, to obtain a supplemental report from Dr. Nadar addressing whether and when appellant’s aggravation of osteoarthritis ceased.

As Dr. Nadar declined to provide a further opinion on the case, the Office referred appellant to Dr. Richard T. Sheridan, a Board-certified orthopedic surgeon, for a second opinion evaluation.

In a report dated April 29, 2004, Dr. Sheridan discussed appellant's complaints of pain, reviewed the x-rays of record and listed findings on examination. He stated, "In my opinion the employment-related aggravation of the claimant's osteoarthritis has ceased. I think the date of its cessation was the date that he retired, September 30, 2002." Dr. Sheridan further related:

"I think the claimant's arthritis condition (not just symptoms) affecting his knees, shoulders, and hands would have progressed to his present levels with or without his [f]ederal employment. He has degenerative changes in his proximal interphalangeal joints of his lateral digits. Evidently there has been documentation that he has idiopathic arthritis in his knees. I think that idiopathic osteoarthritis of the shoulders, hands, and knees is naturally progressive because once it begins, mechanical changes occur which lead to its progression."

In a decision dated May 12, 2004, the Office denied appellant's claim for compensation and authorization for medical treatment effective September 30, 2002 on the grounds that the medical evidence did not show that his condition was aggravated by his employment after that date.

By letter dated May 26, 2004, appellant requested a review of the written record.

In a decision dated November 4, 2004, a hearing representative affirmed the Office's May 12, 2004 decision after finding that the weight of the medical evidence established that appellant's aggravation of osteoarthritis ceased on September 30, 2002.

### **LEGAL PRECEDENT**

Under the Federal Employees' Compensation Act,<sup>1</sup> when employment factors cause an aggravation of an underlying condition, the employee is entitled to compensation for the periods of disability related to the aggravation.<sup>2</sup> When the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased, even if the employee is medically disqualified to continue employment because of the effect work factors may have on the underlying condition.<sup>3</sup>

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of compensation.<sup>4</sup> Thus, after the Office determines that an employee has disability causally related to his or her employment, the Office may not terminate

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> *Chris Wells*, 52 ECAB 445 (2001); *Raymond W. Behrens*, 50 ECAB 221 (1999).

<sup>3</sup> *Raymond W. Behrens*, *supra* note 2.

<sup>4</sup> *Gloria J. Godfrey*, 52 ECAB 486 (2001).

compensation without establishing either that its original determination was erroneous or that the disability has ceased or is no longer related to the employment injury.<sup>5</sup> The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.<sup>6</sup>

### ANALYSIS

In this case, the Office accepted that appellant sustained a temporary aggravation of osteoarthritis of the bilateral knees, shoulders and hands based on the opinion of Dr. Nadar, an Office referral physician. The Office, after development of the medical evidence, found that appellant had not established that he had an employment-related condition after September 30, 2002 based on the opinion of Dr. Sheridan, who provided a second opinion evaluation. As the Office accepted appellant's claim for a temporary aggravation of osteoarthritis, it has the burden to show that his condition has resolved.<sup>7</sup>

In a report dated September 14, 2003, Dr. Baker noted that the Office accepted appellant's claim for a temporary aggravation of osteoarthritis and opined that appellant's continuing complaints were "directly related to his employment." She related that she treated appellant subsequent to his retirement and "his symptoms have not improved and he continues to suffer from the pain and discomfort that his osteoarthritis causes." Dr. Baker further found that appellant required further medical treatment. She concluded, "[S]ince [appellant] continues to have symptoms requiring treatment, I believe that his arthritis has neither stopped nor reversed. Therefore, the before referenced 'temporary aggravation' has continued until this day, almost one year since he ceased to be employed."

Dr. Sheridan, the Office referral physician, provided a report dated April 29, 2004 in which he found that the temporary aggravation of appellant's osteoarthritis ceased on September 30, 2002. He related that appellant's condition "would have progressed" regardless of his employment as "idiopathic osteoarthritis of the shoulders, hands, and knees is naturally progressive because once it begins, mechanical changes occur which lead to its progression."

The Board finds a conflict of medical opinion between appellant's physician, Dr. Baker and Dr. Sheridan, the Office referral physician, regarding whether appellant's temporary aggravation of osteoarthritis ceased on September 30, 2002. Section 8123(a) of the Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.<sup>8</sup> When there are opposing medical reports of virtually equal

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<sup>5</sup> *Raymond W. Behrens, supra* note 2.

<sup>6</sup> *John F. Glynn, 53 ECAB 562 (2002); Pamela Guesford, 53 ECAB 726 (2002).*

<sup>7</sup> *See John F. Glynn, supra* note 6.

<sup>8</sup> 5 U.S.C. § 8123(a).

weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.<sup>9</sup>

On remand of the case, the Office should refer appellant, the case record and a statement of accepted facts, to an appropriate specialist to resolve the conflict regarding whether the aggravation of appellant's temporary aggravation of osteoarthritis ceased and, if so, the date of the cessation. Following this and such other development as is deemed necessary, the Office shall issue an appropriate decision.

### **CONCLUSION**

The Board finds that the case is not in posture for decision as there is a conflict in medical opinion.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated November 4 and May 12, 2004 are set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: May 17, 2005  
Washington, DC

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>9</sup> *Delphia Y. Jackson*, 55 ECAB \_\_\_\_ (Docket No. 04-165, issued March 10, 2004).