

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

MICHAEL C. GEISLER, Appellant

and

**DEPARTMENT OF THE ARMY, NATIONAL
GUARD BUREAU, Milford, MA, Employer**

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**Docket No. 05-1962
Issued: May 19, 2006**

Appearances:
William E. Shanahan, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 26, 2005 appellant filed a timely appeal from an August 17, 2005 merit decision of the Office of Workers' Compensation Programs denying modification of a decision terminating his medical and compensation benefits on the grounds that he had no residuals of his work-related injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the case.

ISSUES

The issue is whether the Office met its burden of proof to justify termination of appellant's compensation benefits for the accepted conditions of aggravation of low back and cervical strain effective September 25, 2003.

FACTUAL HISTORY

On May 1, 1998 appellant then a 43-year-old mechanic, filed a traumatic injury claim alleging that on that date he slipped while mopping a floor and injured his shoulder, neck and

upper back.¹ The Office accepted appellant's claim for aggravation of low back and cervical strain and paid appropriate compensation. Appellant stopped work on May 1, 1998 and did not return.

Appellant came under the treatment of Dr. Robert Swotinsky, Board-certified in preventative medicine, who noted treating appellant from May 8, 1998 to May 13, 1999 for a back injury occurring on May 1, 1998. Appellant reported symptoms of low back and neck pain radiating into his arm and the physician diagnosed chronic low back pain syndrome, musculoskeletal in nature. He was also treated by Dr. John R. Schneeweis, a Board-certified family practitioner. In reports dated May 20 to November 12, 1998, Dr. Schneeweis noted treating appellant for a back injury occurring on May 1, 1998 when he fell at work. He stated that appellant injured his neck in a 1996 motorcycle accident while on duty with the National Guard and continued to experience cervical radiculopathy. He diagnosed work-related back injury and acute exacerbation of chronic back pain syndrome and advised that appellant was totally disabled.

Appellant submitted reports from Dr. Schneeweis dated November 24, 1999 to June 5, 2000. He opined that appellant's symptoms were causally related to his work accident of May 1, 1998 and that appellant remained totally disabled. Dr. Schneeweis also stated that appellant developed ongoing chronic depression. In a report dated May 24, 2002, Dr. Schneeweis advised that appellant underwent various modalities to relieve his neck and back pain; however, these treatments provided only marginal relief. He further noted that appellant experienced chronic depression exacerbated by his chronic pain which was directly and causally related to his industrial accident of May 1998.

On May 15, 2003 the Office referred appellant to Dr. Donald R. Pettit, a Board-certified orthopedic surgeon, to determine whether he had any residuals of his work-related condition of aggravation of low back and cervical strain. The Office provided the physician with appellant's medical records, a statement of accepted facts and a detailed description of appellant's employment duties. In a report dated June 9, 2003, Dr. Pettit indicated that he reviewed the records provided and performed a physical examination of appellant. He noted a history of appellant's condition. Dr. Pettit diagnosed lumbar strain and cervical strain which by history were causally related to the May 1, 1998 work injury. He advised that there was no objective physical findings to substantiate appellant's continuing complaints and noted that appellant had reached maximum medical improvement. Dr. Pettit opined that appellant was fully recovered from the May 1, 1998 injury and had no residuals or disability and would not require any further treatment.

On June 13, 2003 the Office issued a notice of proposed termination of appellant's compensation and medical benefits for appellant's aggravation of back and cervical strain on the grounds that Dr. Pettit's report dated June 9, 2003 established no residuals of the work-related aggravation of back and cervical strain.

¹ Appellant filed a claim for an injury sustained on May 13, 1993 which the Office accepted for low back strain, file number 01-0310731.

In a letter dated June 17, 2003, appellant, through his attorney, disagreed with the proposed termination of compensation and advised that the weight of the evidence should be accorded to Drs. Schneeweis and Swotinsky, who opined that appellant had continuing residuals from his May 1, 1998 work injury and was totally disabled. Appellant also contended that the statement of accepted facts was inaccurate. He submitted a June 25, 2003 report from Dr. Schneeweis who diagnosed chronic pain syndrome causally related to the May 1, 1998 work injury and chronic depression exacerbated by chronic pain. Dr. Schneeweis opined that appellant remained totally disabled. Also submitted was a report from Dr. E.H. Pyun, a Board-certified internist, dated June 30, 2003, who noted treating appellant for neck, back and hand pain. Dr. Pyun stated that it was Dr. Schneeweis' opinion that appellant's chronic pain was related to his industrial accident of May 1998 and that appellant was chronically and permanently disabled. Dr. Pyun indicated that appellant was totally disabled to the chronic pain in his neck and back.

On July 11, 2003 the Office found a conflict of medical opinion between Dr. Schneeweis who indicated that appellant remained disabled due to the work-related aggravation of back and cervical strain and Dr. Pettit who determined that appellant did not have any residuals of his accepted aggravation of back and cervical strain or continuing disability.

The Office referred appellant to Dr. Osama A. Al-Masri, a Board-certified orthopedic surgeon, selected as the impartial specialist. In a report dated August 14, 2003, he reviewed the records provided and performed a physical examination of appellant. He noted a history of appellant's work-related injury. Dr. Al-Masri diagnosed low back pain caused by degenerative disc disease of the cervical and lumbar spine preexisting the May 1, 1998 injury. He noted that the physical examination did not reveal objective findings. Although appellant had limited range of motion, he believed this was related to apprehension and some exaggeration rather than continuing residuals of the accepted conditions. Dr. Al-Masri noted that appellant had degenerative disc disease partially related to the injury of May 1, 1998; however, any aggravation would have subsided within five years. He also indicated that appellant had residual chronic pain secondary to the degenerative disc disease and aggravation of preexisting condition but noted that these conditions would have resolved within 6 to 12 months of injury. Dr. Al-Masri advised that appellant was capable of moderate activity with a change in position from standing to sitting every 1 to 2 hours, lifting limited to 25 pounds and no repetitive bending or twisting. He opined that appellant had reached maximum medical improvement. Dr. Al-Masri indicated that appellant was partially disabled; however, his disability and symptoms were related to the underlying degenerative disc disease.

By decision dated September 25, 2003, the Office terminated appellant's compensation benefits for aggravation of back and cervical strain effective that day. It found that the weight of the medical evidence rested with Dr. Al-Masri, the referee physician who opined that appellant had no continuing residuals of the work-related aggravation of back and cervical strain.

By letter dated May 6, 2004, appellant requested a review of the written record, contending that the statement of accepted facts was inaccurate and prejudicial, specifically noting that a motorcycle accident was incorrectly noted as occurring in 1997 instead of 1996. He further noted that the statement of accepted facts prejudiced his claim for a consequential condition of depression by referencing that there was no accepted psychological condition.

Appellant contended that the Office failed to adjudicate his claim for a consequential psychological chronic pain syndrome and depression. He asserted that the Office failed to impartially choose the referee physician and left the choice to a paid consultant medical network whose motivation was to select prejudiced physicians so as to continue its contract with the government.

In a decision dated August 17, 2005, the hearing representative affirmed the September 25, 2003 decision.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.² 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.³ 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 a claimant no longer has residuals of an employment-related condition, which requires further medical treatment.⁴

ANALYSIS

The Office accepted appellant's claim for aggravation of low back and cervical strain. It found that a conflict of medical opinion arose between Dr. Pettit, a Board-certified referral orthopedic surgeon, who found that appellant's accepted conditions had resolved, and the attending physician, Dr. Schneeweis, a Board-certified orthopedist, who opined that appellant still had residuals of the accepted conditions of aggravation of low back and cervical strain. As there was a conflict in the medical opinion evidence, the Office properly referred appellant for an impartial medical examination by Dr. Al-Masri, a Board-certified orthopedic surgeon.⁵

Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.⁶

In an August 14, 2003 report, Dr. Al-Masri reviewed the entire case record and statement of accepted facts. He examined appellant thoroughly and related his clinical findings.

² *Gewin C. Hawkins*, 52 ECAB 242 (2001); *Alice J. Tysinger*, 51 ECAB 638 (2000).

³ *Mary A. Lowe*, 52 ECAB 223 (2001).

⁴ *Id.*; *Leonard M. Burger*, 51 ECAB 369 (2000).

⁵ 5 U.S.C. § 8123(a), in pertinent part, provides: "If there is a 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."

⁶ *Solomon Polen*, 51 ECAB 341 (2000).

Dr. Al-Masri noted that the physical examination did not reveal objective findings of the accepted conditions but that any limitation in range of motion was related to apprehension and some exaggeration rather than objective residuals. He advised that appellant did have degenerative disc disease partially related to the injury of May 1, 1998; however, the aggravation caused would have subsided within five years. Dr. Al-Masri also indicated that appellant had residual chronic pain secondary to the preexisting degenerative disc disease but that these conditions would have resolved within 6 to 12 months of the injury. He diagnosed degenerative disc disease of the cervical and lumbar spine which preexisted the May 1, 1998 work injury and noted that there were no specific residuals from the accepted aggravation of lumbar and cervical strains. Dr. Al-Masri advised that appellant reached maximum medical improvement and was capable of moderate activity with a change in position from standing to sitting every 1 to 2 hours, lifting limited to 25 pounds and no repetitive bending or twisting. He indicated that there were no residual restrictions related to the May 1, 1998 injury.

The Board finds that the opinion of Dr. Al-Masri is sufficiently well rationalized and based upon a proper factual background such that it is entitled to special weight and establishes that appellant's work-related aggravation of the lumbar and cervical strain of May 1, 1998 has ceased. He reviewed the entire case record and statement of accepted facts and had examined appellant. Dr. Al-Masri provided rationale as to why appellant's current medical conditions of lumbar and cervical strain was not causally related to his accepted work injuries but related to his underlying degenerative disc disease.

Dr. Al-Masri found that appellant did not have continuing residuals or disability related to the accepted condition.

The Board finds that Dr. Al-Masri's opinion constitutes the weight of the medical evidence and is sufficient to justify the Office's termination of benefits. The Office met its burden of proof in terminating appellant's compensation benefits effective September 25, 2003.

The Board further finds that appellant failed to establish that he had any continuing disability after September 25, 2003.

As the Office met its burden of proof to terminate appellant's compensation benefits, the burden shifted to him to establish that he had disability causally related to his accepted injury.⁷ To establish 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 factual and medical background, supporting such causal relationship.⁸

Subsequent to the termination of benefits, appellant did not submit any new medical evidence. Appellant asserted that the statement of accepted facts dated May 14, 2003 was inaccurate and prejudicial, as it indicated that he had a motorcycle accident in 1997 instead of 1996. The Board has reviewed Dr. Al-Masri's report and cannot fault it on this ground. He reviewed appellant's history and, as noted above, demonstrated an awareness of the 1996

⁷ See *Manuel Gill*, 52 ECAB 282 (2001).

⁸ *Id.*

motorcycle accident and appellant's accepted conditions. Although there may be minor errors in the statement of accepted facts, the impartial medical adviser addresses appellant's accepted injuries of 1998 and the accepted conditions of aggravation of low back and cervical strain. He provided findings on examination of each of these areas and a review of the diagnostic testing. Appellant further asserted that the statement prejudiced his claim for a consequential condition of depression by referencing that there was no accepted psychological condition. However, the Board notes that Dr. Al-Masri was asked to resolve the conflict in medical opinion with regard to whether appellant had ongoing residuals of his accepted work-related conditions. As appellant's claim was never accepted for a psychological condition, the physician did not address this matter. Therefore, the Board finds this argument to be without merit.

Appellant contended that the Office failed to adjudicate his claim for a consequential psychological chronic pain syndrome and depression. However, since the Office did not issue a final decision with regard to this matter, it is not before the Board on the present appeal.⁹

Appellant also asserted that the Office failed to impartially choose a referee physician and permitted a paid consultant medical network to choose the physician whose motivation was to select prejudiced and biased physicians so as to continue its contract with the government. However, he submitted no evidence to support this assertion that any particular aspect of the selection created bias. The Board has held that an impartial medical specialist properly selected under the Office's rotational procedures will be presumed unbiased and the party seeking disqualification bears the substantial burden of proving otherwise; mere allegations are insufficient to establish bias.¹⁰ Appellant has not substantiated his allegations.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits for aggravation of low back and cervical strain on September 25, 2003. The Board further finds that appellant failed to establish that he has a continuing condition or disability causally related to his employment injuries of her aggravation of low back and cervical strain on or after September 25, 2003.

⁹ See 20 C.F.R. § 501.2(c).

¹⁰ See *William Fidurski*, 54 ECAB 146 (2002).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 17, 2005 is affirmed.

Issued: May 19, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board