

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

W.W., Appellant

and

**DEPARTMENT OF THE ARMY, LETTERKENNY
ARMY DEPOT, Chambersburg, PA, Employer**

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) **Docket No. 07-970**
) **Issued: August 15, 2007**
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Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 26, 2007 appellant filed a timely appeal of a January 30, 2007 merit decision the Office of Workers' Compensation Programs, terminating his compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this termination case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation effective February 18, 2007 on the grounds that he no longer had any residuals or disability causally related to his October 4, 1999 employment-related injury.

FACTUAL HISTORY

On October 4, 1999 appellant, then a 49-year-old blocker and bracer, sustained injury to his low back while unloading a truck. A metal strap on the back of his jacket became caught and he flipped off the back of the truck. Appellant fell five and one-half feet to the ground landing

on his feet. By letter dated October 19, 1999, the Office accepted the claim for lumbar sprain. It paid appellant appropriate compensation.

On May 2, 2000 Dr. Ashok DeVasenapathy, a neurologist, released appellant to return to work. Appellant returned to work on May 3, 2000 and stopped work on that day. He has not returned. The Office paid appropriate compensation as of May 19, 2000.¹

In an August 20, 2003 medical report, Dr. Mehrullah Khan, an attending Board-certified neurologist, opined that appellant was totally disabled for work in the absence of objective neurological findings to support his complaints of weakness and pain in his lower extremities and back pain.

By letter dated October 28, 2005, the Office referred appellant, together with a statement of accepted facts, the case record and a list of questions, to Dr. Robert F. Draper, a Board-certified orthopedic surgeon, for a second opinion medical examination. In a November 17, 2005 report, Dr. Draper reviewed the medical records and provided findings on physical examination. He opined that appellant's employment-related lumbosacral strain had long since resolved and his present low back pain syndrome was not related to the accepted employment injury but due to preexisting degenerative lumbar disc disease and multiple disc protrusions in the lumbar spine. Dr. Draper opined that appellant's contusion of the right elbow and forearm had also resolved. He stated that appellant's present right upper extremity problems were related to ulnar nerve entrapment syndrome and surgery that he had prior to the September 22, 1994 employment injury. Dr. Draper found that appellant was capable of performing light-duty work, 8 hours a day, 40 hours per week that did not require him to lift more than 20 pounds. In a November 13, 2005 work capacity evaluation (Form OWCP-5c), he provided additional restrictions.

On November 22, 2005 the Office found a conflict in the medical opinion evidence between Dr. Khan and Dr. Draper regarding whether appellant had any continuing employment-related residuals. By letter dated February 15, 2006, the Office referred appellant, together with a statement of accepted facts, the case record and a list of questions to Dr. Frank G. Nisenfeld, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a March 9, 2006 report, Dr. Nisenfeld reviewed the history of appellant's October 4, 1999 employment injury. He reported appellant's current symptoms and normal findings on physical examination with regard to muscle strength, sensory, reflex and circulation. On examination of appellant's back, Dr. Nisenfeld reported decreased range of motion. He stated that appellant had poor balance with standing on individual legs and that he was unable to heel or toe walk. Straight leg raising was nonradicular, but was restricted by back pain. Dr. Nisenfeld reviewed appellant's medical records including Dr. Draper's November 17, 2005 report and an October 26, 1999 magnetic resonance imaging scan that was negative and showed degenerative disc diseases at L3-4, L4-5 and L5-S1. He diagnosed lumbosacral strain/sprain that had resolved and preexisting degenerative disc disease and degenerative joint disease of the lumbosacral spine. Dr. Nisenfeld opined that appellant's prognosis was poor for returning to work as he had not worked in six years. He had no recommendations for further medical treatment. Appellant

¹ Effective September 9, 2002 appellant retired from the employing establishment on disability.

was limited to lifting no more than 25 pounds due to his chronic preexisting degenerative disc disease. Dr. Nisenfeld concluded that appellant did not continue to have any residuals of his October 4, 1999 employment injury.

By letter dated March 24, 2006, the Office requested that Dr. Nisenfeld submit an addendum report addressing whether appellant had any continuing residuals of his September 22, 1994 employment injury.

On May 12, 2006 Dr. Nisenfeld reexamined appellant. In a May 15, 2006 report, he reviewed a history of the accepted September 22, 1994 employment injury and appellant's medical records. Dr. Nisenfeld reported appellant's range of motion findings on examination of appellant's right upper extremity. He opined that appellant had impairment due to the accepted employment injury. Dr. Nisenfeld determined that he had a five percent impairment of the right elbow based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001).

By letter dated November 21, 2006, the Office issued a notice of proposed termination of appellant's compensation with regard to his October 4, 1999 employment injury based on Dr. Nisenfeld's medical opinion. The Office provided 30 days in which appellant could respond to this notice.

In a December 5, 2006 statement, appellant related that he could not work due to residuals of his work-related injury. He experienced a burning sensation in his legs, arm and back, pressure on his back and a stabbing sensation in his buttocks. Appellant also experienced severe pain in his legs and stiffness with increasing difficulty with his balance and a tendency to drift to the right side when he walked. The pain and pressure on his spine caused him to experience headaches and pain in his right eye. Appellant stated that he had high blood pressure that was difficult to control even with medication due to his persistent pain. He also had long-standing reflex sympathetic dystrophy due to his September 22, 1994 employment injury.

In a December 6, 2006 report, Dr. Khan related appellant's current symptoms related to his lower extremities and right arm. He reviewed a history of his accepted work-related employment injuries. Dr. Khan reported essentially normal findings on neurological examination. He opined that appellant "probably" either had spinal stenosis or lumbar radiculopathy which may be the basis for his symptomatology at that time. Dr. Khan further opined that appellant "may" have some emotional overlay to his difficulties. On December 13, 2006 he performed an electromyogram (EMG) and nerve conduction study of appellant's lower extremities. It was an abnormal examination. Dr. Khan stated that it was consistent with peripheral neuropathy and chronic denervation at L4-5 and L5-S1 on the left side.

By letter dated December 27, 2006, the Office requested that Dr. Nisenfeld review Dr. Khan's December 6, 2006 report and diagnostic findings.

The Office received Dr. Khan's December 20, 2006 treatment note which stated that appellant's condition had not improved. He opined that appellant was unable to return to work from a physical and emotional standpoint.

In a letter dated January 16, 2007, Dr. Nisenfeld stated that he reviewed the additional medical evidence, his records and appellant's case file. He stated that there was no change in his prior May 15, 2005 opinion. In an accompanying OWCP-5c form, Dr. Nisenfeld stated that appellant could not use his right upper extremity with force greater than 10 pounds.

By decision dated January 30, 2007, the Office terminated appellant's compensation benefits with regard to his October 4, 1999 employment injury, effective February 18, 2006 based on Dr. Nisenfeld's impartial medical opinion.

LEGAL PRECEDENT

Once the Office accepts 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.² The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.³

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.⁴

ANALYSIS

The Board finds that a conflict in the medical opinion evidence arose between Dr. Khan, an attending physician, and Dr. Draper, an Office referral physician, as to whether appellant had any continuing residuals or disability causally related to his accepted October 4, 1999 employment-related injury. His claim for the October 4, 1999 injury was accepted for a lumbar sprain. Dr. Khan opined that, although appellant's subjective complaints related to his lower extremities and back could not be supported by objective medical findings, he was totally disabled. Dr. Draper opined that appellant's October 4, 1999 employment injury had resolved and he was capable of working eight hours a day with restrictions.

The Office referred appellant to Dr. Nisenfeld, selected as the impartial medical specialist. In a March 9, 2006 report, Dr. Nisenfeld reviewed the history of appellant's October 4, 1999 employment injury. On physical examination, he reported decreased range of motion of appellant's back, his poor balance with standing on individual legs and inability to heel or toe walk and nonradicular straight leg raising that was restricted by back pain. Dr. Nisenfeld diagnosed lumbosacral strain/sprain that had resolved and preexisting degenerative disc disease and degenerative joint disease of the lumbosacral spine. He opined that appellant's

² *Jason C. Armstrong*, 40 ECAB 907 (1989).

³ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁴ *Gloria J. Godfrey*, 52 ECAB 486 (2001).

prognosis was poor for returning to work as he had not worked in six years. Dr. Nisenfeld limited appellant to lifting no more than 25 pounds due to his chronic preexisting degenerative disc disease. He concluded that appellant did not suffer from any residuals of his October 4, 1999 employment injury.

The Board finds that Dr. Nisenfeld's March 9, 2006 opinion is based on a proper factual and medical background and is entitled to special weight. He found that appellant no longer had any residuals or disability causally related to the October 4, 1994 employment-related lumbar sprain. For this reason, Dr. Nisenfeld's report constitutes the special weight of the medical opinion evidence afforded an impartial medical specialist.

Dr. Khan's December 6, 2006 report found that appellant "probably" either had spinal stenosis or lumbar radiculopathy which may have been the basis for his lower extremity and right arm symptoms and he "may" have some emotional overlay to his difficulties. He did not provide a definite diagnosis of a back or emotional condition. Dr. Khan's December 13, 2006 EMG and nerve conduction study of appellant's lower extremities found peripheral neuropathy and chronic denervation at L4-5 and L5-S1 on the left side. However, he did not address the causal relationship between appellant's current conditions and his October 4, 1999 employment injury and, therefore, his report lacks probative value.⁵ Similarly, Dr. Khan's December 20, 2006 treatment note which found that appellant's condition had not improved and he was disabled for work from both a physical and emotional standpoint lacks probative value. He did not address whether appellant's disability was causally related to his accepted employment injury.⁶ Furthermore, Dr. Khan was part of the conflict in medical opinion for which appellant was referred to Dr. Nisenfeld.⁷ Therefore, his reports and treatment note are insufficient to overcome or to create a conflict with the well-rationalized medical opinion of Dr. Nisenfeld.⁸

The Board finds that the weight of the medical evidence, which is represented by Dr. Nisenfeld's March 9, 2006 impartial medical report, establishes that appellant no longer has any residuals or disability causally related to his October 4, 1999 employment injury.

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation effective February 18, 2007 on the grounds that he no longer had any residuals or disability causally related to his October 4, 1999 employment-related injury.

⁵ *Mary A. Ceglia*, 56 ECAB ____ (Docket No. 04-113, issued July 22, 2004).

⁶ *Id.*

⁷ *See Jaja K. Asaramo*, 55 ECAB 200 (2004) (submitting a report from a physician who was on one side of a medical conflict that an impartial specialist resolved is generally insufficient to overcome the weight accorded to the report of the impartial medical examiner or to create a new conflict).

⁸ *Michael Hughes*, 52 ECAB 387 (2001).

ORDER

IT IS HEREBY ORDERED THAT the January 30, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 15, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board