

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

E.B., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Cincinnati, OH, Employer**

)
)
)
)
)
)
)
)
)
)

**Docket No. 08-822
Issued: September 22, 2008**

Appearances:
Alan J. Shapiro, Esq., for the appellant
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 January 24, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' February 28 and December 11, 2007 merit decisions concerning the termination of 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 case.

ISSUE

The issue is whether the Office met its burden of proof to terminate appellant's compensation effective February 28, 2007 on the grounds that he had no residuals of his September 13, 1986 employment injury after that date.

FACTUAL HISTORY

The Office accepted that on September 13, 1986 appellant, then a 37-year-old housekeeping aide, sustained a low back strain due to putting 60-pound bags into a cart at work.¹

¹ Appellant was working 20 hours per week at the time of his injury.

He stopped work for various periods and the Office paid disability compensation. Appellant stopped work on July 1, 1987 and did not work again except for the period July 23 to 25, 1988.²

In an April 29, 1996 decision, the Office reduced appellant's compensation to reflect that he had the ability to earn wages as a security guard for 20 hours per week. In a February 18, 1997 decision, an Office hearing representative affirmed the Office's April 29, 1996 decision.

In the late 1990s, appellant began to be treated by Dr. Clarence J. Louis, a Board-certified neurologist. In numerous reports dated through late 2003, Dr. Louis detailed his treatment of appellant and provided such diagnoses as chronic low back pain and chronic neck pain. In a July 18, 2005 report, Dr. Richard T. Sheridan, a Board-certified orthopedic surgeon, who served as an Office referral physician, indicated that appellant had no abnormal orthopedic findings and therefore had no orthopedic diagnoses.

The Office determined that there was a conflict in the medical evidence and referred appellant to Dr. John Wolf, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on whether he continued to have residuals of his September 13, 1986 employment injury.³ In a May 25, 2006 report, Dr. Wolf determined that appellant had no objective orthopedic abnormalities and therefore had no orthopedic diagnoses. The Office subsequently determined that referral to an impartial medical specialist was inappropriate as there was no conflict in the medical evidence at the time of the referral.⁴

In several reports dated between January 2006 and January 2007, Dr. Mohammad R. Khan, an attending Board-certified internist, indicated that appellant complained of low back pain. He diagnosed disc herniation and provided appellant with pain medication.

In October 2006, the Office referred appellant to Dr. Gregory Fisher, a Board-certified orthopedic surgeon, for an opinion on whether he continued to have residuals of his September 13, 1986 low back strain. On November 24, 2006 Dr. Fisher detailed appellant's medical history including his September 13, 1986 injury and subsequent treatment for low back pain. He indicated that on examination appellant was nontender over the sacroiliac joint and exhibited no muscle atrophy or spasms in the lumbosacral area. Appellant had 5/5 strength and normal sensation in his lower extremities and did not exhibit any pain on straight leg raising.

² The findings of July 5, 1988 x-rays of appellant's lumbosacral spine showed normal results with intact vertebral heights and disc spaces. The findings of July 26, 1988 computerized tomography (CT) scan testing revealed diffuse posterior disc bulging at L3-4 and L4-5 with a shallow spinal canal. Magnetic resonance imaging scan from September 10, 1991 showed mild central stenosis between L3 and S1 without significant compression of the thecal sac or disc herniation.

³ Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part: "If there is 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." 5 U.S.C. § 8123(a). When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence. *William C. Bush*, 40 ECAB 1064, 1975 (1989).

⁴ An Office claims examiner indicated that no conflict in the medical evidence was clearly identified between the older reports of Dr. Louis, which were last produced in late 2003 and the July 18, 2005 report of Dr. Sheridan.

Dr. Fisher concluded that appellant did not have any residuals of his September 13, 1986 low back strain and indicated that this opinion was based on the fact that he did not have any objective signs of such an injury.⁵ He stated that appellant's low back strain was of such a nature that it would have resolved within two or three months of September 13, 1986.

In a January 23, 2007 letter, the Office advised appellant of its proposed termination of his compensation based on the opinion of Dr. Fisher. It provided appellant 30 days to submit additional evidence if he felt the termination was unwarranted. In a January 26, 2007 letter to the Office, Dr. Khan indicated that attached reports showed that appellant's claim should be accepted for disc displacement without myelopathy of the lumbar spine. He attached his reports which had previously been submitted to the Office.

In a February 28, 2007 decision, the Office terminated appellant's compensation effective February 28, 2007 on the grounds that he had no residuals of his September 13, 1986 employment injury after that date. It determined that the well-rationalized opinion of Dr. Fisher showed that appellant no longer had residuals of his September 13, 1986 employment injury. The Office found that Dr. Kahn did not provide medical rationale explaining how appellant sustained a condition more serious than a low back strain on September 13, 1986.⁶

Appellant submitted a March 1, 2007 report in which Dr. Khan indicated that he complained of back pain radiating into both legs when he first saw him in December 2005. Dr. Khan indicated that a July 26, 1988 CT scan showed bulging at L3-4 and L4-5 with a shallow spinal canal. He stated, "Considering the patient's chronic back pain, combined with radiation of his pain to his legs, which is not relieved by pain medication, I believe the patient now has disc herniation in his lumbar spine area, in addition to his allowed diagnosis of lumbosacral sprain.

Appellant requested a review of the written record. In a December 11, 2007 decision, an Office hearing representative affirmed the Office's February 28, 2007 decision.

LEGAL PRECEDENT

Under the Act,⁷ once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.⁸ The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁹ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.¹⁰

⁵ Dr. Fisher also noted that Dr. Wolf and Dr. Sheridan did not find any objective signs of a low back strain.

⁶ The Office terminated appellant's compensation for both wage loss and medical benefits.

⁷ 5 U.S.C. §§ 8101-8193.

⁸ *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

⁹ *Id.*

¹⁰ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

ANALYSIS

The Office accepted that on September 13, 1986 appellant sustained a low back strain due to putting bags into a cart at work. It terminated appellant's compensation effective February 28, 2007 on the grounds that he had no residuals of his September 13, 1986 employment injury after that date. The Office based its termination on the opinion of Dr. Fisher, a Board-certified orthopedic surgeon, who served as an Office referral physician.

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Fisher. The November 24, 2006 report of Dr. Fisher establishes that appellant had no residuals of his September 13, 1986 employment injury after February 28, 2007.

On November 24, 2006 Dr. Fisher detailed appellant's medical history including his September 13, 1986 injury and subsequent treatment for low back pain. He indicated that on examination appellant was nontender over the sacroiliac joint and exhibited no muscle atrophy or spasms in the lumbosacral area. Appellant had 5/5 strength and normal sensation in his lower extremities and did not exhibit any pain on straight leg raising. Dr. Fisher concluded that appellant did not have any residuals of his September 13, 1986 low back strain.

The Board has carefully reviewed the opinion of Dr. Fisher and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Fisher's opinion is based on a proper factual and medical history in that he had the benefit of an accurate and up-to-date statement of accepted facts, provided a thorough factual and medical history and accurately summarized the relevant medical evidence.¹¹ He explained that his opinion that appellant ceased to have residuals of his September 13, 1986 low back strain was based on the fact that he did not have any objective signs of such an injury. Dr. Fisher noted that other physicians also failed to find any objective signs of a low back strain. He indicated that appellant's low back strain was of such a nature that it would have resolved within two or three months of September 13, 1986.¹²

Appellant submitted reports from early 2007 in which Dr. Khan, an attending internist indicated that his claim should be accepted for a disc herniation. However, Dr. Khan's reports do not show that appellant sustained a condition more serious than a low back strain on September 13, 1986. He indicated that appellant complained of pain radiating from his back to his legs when he first saw him in December 2005 and noted that diagnostic testing from almost two years after the September 13, 1986 injury showed bulging lumbar discs. Dr. Khan did not explain how the diagnostic findings from 1986 were relevant to appellant's present condition or disability. He did not provide a complete history of appellant's medical condition and did not

¹¹ See *Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

¹² The Board notes that Dr. Fisher's report does not come into conflict with any reports of appellant's attending physicians. In several reports dated between January 2006 and January 2007, Dr. Khan, an attending Board-certified internist, indicated that appellant complained of low back pain and diagnosed disc herniation. However, he did not provide any opinion that appellant continued to have residuals of his September 13, 1986 injury. See *supra* note 3 regarding the creation of conflicts in the medical evidence.

provide medical rationale explaining how the September 13, 1986 employment incident could have caused a disc herniation or some other condition other than a low back strain.

For these reasons, the Office properly terminated appellant's compensation effective February 28, 2007 on the grounds that he had no residuals of his September 13, 1986 employment injury after that date.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation effective February 28, 2007 on the grounds that he had no residuals of his September 13, 1986 employment injury after that date.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' December 11 and February 28, 2007 decisions are affirmed.

Issued: September 22, 2008
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