

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

L.P., Appellant

and

**DEPARTMENT OF THE ARMY, IOWA
NATIONAL GUARD, CAMP DODGE,
Johnston, IA, Employer**

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**Docket No. 08-1648
Issued: August 28, 2009**

Appearances:
Wendy D. Boka, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 22, 2008 appellant filed a timely appeal from a February 27, 2008 decision of the Office of Workers' Compensation Programs affirming the termination of his compensation benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation benefits effective January 22, 2006 on the grounds his accepted lumbar injury had ceased; and (2) whether appellant established that he had a continuing disability on and after January 22, 2006 related to an accepted aggravation of a herniated disc. On appeal, he asserts that the Office erred by according special weight to the opinion of Dr. Peter Wirtz, a Board-certified orthopedic surgeon and an impartial medical examiner, as he failed to review the medical record and provided insufficient rationale supporting that the accepted injury resolved without residuals. Also, appellant contends that the Office violated public policy by attempting to reemploy him after 26 years of work-related total disability.

FACTUAL HISTORY

This is appellant's third appeal before the Board in this case. By decision issued March 18, 2002,¹ the Board reversed an April 10, 2000 wage-earning capacity determination and affirmed an April 10, 2000 decision, denying his emotional condition claim. By decision issued January 31, 2008,² the Board set aside a September 12, 2006 decision terminating appellant's compensation and remanded the case for reconstruction of the record. The law and the facts of the case as set forth in the Board's prior decisions are incorporated by reference.

The Office accepted that on January 31, 1980 appellant, then a 44-year-old heavy equipment operator, sustained an aggravation of a right-sided herniated nucleus pulposus at L5-S1 when he slipped and fell on an icy ramp. He received compensation for total disability beginning in 1981. Appellant remained under medical treatment.

In an October 17, 2003 report, Dr. Joshua D. Kimelman, an attending osteopathic physician Board-certified in orthopedic surgery, noted appellant's chronic back pain. Appellant also had congestive heart failure, diabetes, diabetic retinopathy, hypertension and hypercholesterolemia. On examination, Dr. Kimelman observed an antalgic gait, balance problems and marked restriction in all planes of spinal motion. He obtained x-rays showing near fusion of L5-S1 and degenerative disc disease. Dr. Kimelman diagnosed chronic low back pain.

In an October 28, 2003 letter, Dr. G. Eric Hockett, an attending Board-certified family practitioner, found appellant permanently disabled for work due to degenerative disc disease.

On April 20, 2005 the Office referred appellant, the medical record and a statement of accepted facts to Dr. Keith W. Riggins, a Board-certified orthopedic surgeon, for a second opinion examination. Dr. Riggins submitted a May 23, 2005 report attributing his back pain and sciatica primarily to degenerative spinal stenosis. The herniated disc was "no longer significant." Dr. Riggins explained that the accepted injury permanently exacerbated a "preexisting condition."

In a June 2, 2005 letter, the Office requested that Dr. Riggins clarify whether the January 31, 1980 injury aggravated appellant's underlying spinal stenosis. Dr. Riggins replied on June 6, 2005 that the January 31, 1980 injury did not aggravate his spinal stenosis. On July 5, 2005 the Office requested that Dr. Riggins clarify his change of opinion regarding causal relationship. Dr. Riggins responded in a July 6, 2005 letter that the January 1980 injury "represented a temporary aggravation without permanent long-lasting effects."

On July 27, 2005 the Office found a conflict of medical opinion between Dr. Kimelman, for appellant, and Dr. Riggins, for the government, regarding whether his condition continued to be related to the accepted January 1980 injury. To resolve the conflict, it referred appellant, the

¹ Docket No. 00-2128 (issued March 18, 2002). Following issuance of the Board's March 18, 2002 decision, the Office conducted further development to determine if a selected information clerk position was within appellant's vocational abilities. The vocational rehabilitation effort was closed effective March 6, 2003.

² Docket No. 07-517 (issued January 31, 2008).

medical record and a statement of accepted facts to Dr. Wirtz, a Board-certified orthopedic surgeon. The Office requested that Dr. Wirtz provide a “thorough history” and “perform a careful review of the records.”

In an October 26, 2005 report, Dr. Wirtz related appellant’s account of lumbar pain and right leg weakness. On examination, he noted restricted lumbar motion with degenerative disc disease. Dr. Wirtz noted that appellant had hypertension, diabetes mellitus, coronary and cardiac artery disease, hypothyroidism, multiple joint osteoarthropathy and obesity. Regarding the medical record, he stated, “Records review reveals.” Dr. Wirtz noted that a June 2, 2005 magnetic resonance imaging (MRI) scan showed disc dehydration at L3-4 and L4-5 with congenital fusion of L5-S1. He opined that the accepted January 31, 1980 disc aggravation had resolved and that appellant’s “off and chronic back conditions” were due to multilevel degenerative disc disease, a “natural process.”

By notice dated November 22, 2005, the Office proposed to terminate appellant’s monetary and medical compensation benefits on the grounds that the accepted injury had resolved without residuals. It afforded 30 days to submit additional evidence or argument.³

In a December 22, 2005 letter, appellant argued that it was inappropriate for the Office to terminate his benefits after 25 years of total disability. He submitted a May 5, 2005 report from Dr. Kimelman relating his account of his right leg giving way. Dr. Kimelman noted that a January 2005 MRI scan showed significant central canal stenosis at L4-5 with a prominent five millimeter nerve root or tumor. He diagnosed degenerative disc disease with a possible nerve origin tumor at L5 and ataxia with falling. Dr. Kimelman referred appellant to a spine surgeon.⁴

By decision dated January 4, 2006, the Office terminated appellant’s monetary and medical compensation benefits effective January 21, 2006 on the grounds that the accepted injury had ceased without residuals. It accorded Dr. Wirtz the weight of the medical evidence.

Appellant requested an oral hearing, held on June 27, 2006. At the hearing, he contended that the Office manipulated Dr. Riggins into changing his opinion on causal relationship. Appellant asserted that Dr. Wirtz told him he would not review the medical record because it was too voluminous. He contested that Dr. Wirtz did not examine him, instead offering to become his treating physician and urging him to make an appointment. Appellant submitted additional evidence.

In a February 9, 2006 report, Dr. Kimelman noted treating appellant since 1990. He opined that the January 31, 1980 incident caused or aggravated a herniated L5-S1 disc, precipitating severe and debilitating back pain. Chronic pain led to inactivity and substantial weight gain, thereby worsening appellant’s pain. Dr. Kimelman noted that, while the herniated

³ On December 1, 2005 appellant requested copies of medical records from the Office to prepare a response to the notice of proposed termination. The Office mailed him the records on January 3, 2006.

⁴ Appellant also submitted October and November 2001 reports from Dr. Joseph Galles, an attending Board-certified orthopedic surgeon, regarding elbow pain, left heel pain and an ulcer of the right second toe.

disc itself had resolved, the chronic pain condition continued due to obesity and appellant's nonoccupational conditions. He appended his curriculum vitae.

By decision dated and finalized September 12, 2006, the Office affirmed the termination of appellant's compensation, finding that Dr. Kimelman's February 9, 2006 report was insufficient to create a conflict with Dr. Wirtz' opinion.

Appellant filed his appeal with the Board on December 11, 2006. Following the Board's January 31, 2008 decision remanding the case to the Office for reconstruction of the record, the Office associated Dr. Kimelman's February 9, 2006 report and curriculum vitae with the case record.

By decision dated and finalized February 27, 2008, an Office hearing representative reissued the September 12, 2006 decision, finding that Dr. Wirtz' opinion continued to carry the weight of the medical evidence.

LEGAL PRECEDENT -- ISSUE 1

Once the Office has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.⁵ Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.⁶

Section 8123 of the Federal Employees' Compensation Act provides that, 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.⁷ In situations where there exist 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 upon a proper factual background, must be given special weight.⁸ Where the Office secures an opinion from an impartial medical examiner for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification or elaboration, it has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.⁹

⁵ *Bernadine P. Taylor*, 54 ECAB 342 (2003).

⁶ *Id.*

⁷ 5 U.S.C. § 8123; see *Charles S. Hamilton*, 52 ECAB 110 (2000).

⁸ *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

⁹ *Harry T. Mosier*, 49 ECAB 688 (1998).

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained an aggravation of a herniated L5-S1 disc on January 31, 1980 and paid total disability compensation beginning in 1981. Dr. Kimelman, an attending osteopathic physician Board-certified in orthopedic surgery, submitted reports through October 2003 finding him totally disabled for work due to residuals of the accepted injury. Dr. Riggins, a Board-certified orthopedic surgeon and second opinion physician, found that the January 31, 1980 injury constituted a temporary aggravation which had ceased as of his May 23, 2005 examination.

The Office found a conflict of medical opinion between Dr. Kimelman and Dr. Riggins, and referred appellant to Dr. Wirtz, a Board-certified orthopedic surgeon, for an impartial medical examination. In an October 26, 2005 report, Dr. Wirtz opined that the accepted injury had ceased without residuals. The Office then terminated appellant's compensation effective January 21, 2006, based on Dr. Wirtz' opinion as the weight of the medical evidence. The Board finds, however, that Dr. Wirtz' report is of insufficient weight to resolve the conflict of medical opinion.

The Office instructed Dr. Wirtz to "perform a careful review of the records." Dr. Wirtz did not do so. Regarding the medical record provided to him by the Office, he stated, "Records review reveals." This indicates that Dr. Wirtz did not review the medical record. The only report he referred to was a June 2, 2005 MRI scan. However, there is no June 2, 2005 MRI scan report of record. Therefore, it is unclear as to whether Dr. Wirtz was mistaken as to the date of the report or if there was some other reason for this error. Also, the Board notes that, at the June 27, 2006 oral hearing, appellant asserted that Dr. Wirtz refused to review the medical record. The Board has held that an impartial medical examiner's report is of diminished probative value if it is not based on a complete medical and factual background.¹⁰

Regarding causal relationship, Dr. Wirtz opined that the accepted January 31, 1980 injury had resolved. However, he did not explain when it had resolved or refer to contemporaneous medical records from the case file indicating that the injury resolved. Also, Dr. Wirtz did not refer to specific findings on examination establishing that appellant no longer had any work-related residuals. He attributed appellant's "off and chronic back conditions" to a "natural process" of degenerative disc disease. But Dr. Wirtz did not explain how he differentiated between progressive degenerative disc disease and the effects of the accepted injury. Also, it is unclear as to what he meant by "off and chronic" conditions. This lack of rationale significantly diminishes the probative value of Dr. Wirtz' opinion.¹¹

The lack of an adequate medical and factual background, coupled with insufficient rationale, should have prompted the Office to request a supplemental report from Dr. Wirtz.¹² However, the Office terminated appellant's compensation benefits based on Dr. Wirtz' opinion

¹⁰ *Delphia Y. Jackson*, 55 ECAB 373 (2004).

¹¹ *Jacqueline Brasch (Ronald Brasch)*, *supra* note 8.

¹² *Harry T. Mosier*, 49 ECAB 688 (1998).

without seeking clarification. Thus, the Board finds that the Office did not meet its burden of proof in terminating his medical and monetary compensation benefits.

The case will be returned to the Office for payment of all compensation due and owing from January 22, 2006 onward and reinstatement of other benefits as appropriate. As the Office improperly terminated appellant's compensation, the second issue regarding whether he established continuing disability following the termination is moot.

CONCLUSION

The Board finds that the Office improperly terminated appellant's compensation.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 27, 2008 is reversed.

Issued: August 28, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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