U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of OSWALD ANDREWS and DEPARTMENT OF THE NAVY, NORFOLK NAVAL SHIPYARD, Portsmouth, Va.

Docket No. 97-2684; Submitted on the Record;
Issued June 3, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on August 1, 1997.

The Office accepted that appellant sustained a left shoulder strain, an impingement of the left shoulder, a low back strain, and a herniated disc at L5-S1 on May 2, 1993 by lifting and maneuvering clay valves. The Office authorized an arthroscopic decompression of appellant's left shoulder, which was performed, along with a bursectomy and resection of the cortical acromial ligament, on November 5, 1993.

On September 23, 1996 the Office referred appellant's prior medical reports and a statement of accepted facts to Dr. James C.P. Collier, Jr., a Board-certified orthopedic surgeon, for a second opinion on appellant's condition and its relation to his employment injury. In a report dated October 30, 1996, Dr. Collier concluded that "any symptoms that he may currently have, (no objective findings were found on examination) in my opinion are due to the natural progression of his spondylolysis. It would be extremely unusual for the injury which this man describes and the records described to give problems of this long standing." Dr. Collier stated that appellant was "able to perform the physical requirements of the date-of-injury job." This report created a conflict of medical opinion with that of appellant's attending Board-certified orthopedic surgeon, Dr. Lawrence Morales, whose December 1, 1995 work tolerance limitations would preclude the performance of the position of rigger appellant held when injured. In a report dated August 15, 1996, Dr. Morales indicated that appellant was still disabled, by stating; "I feel that once we can accomplish diagnostic testing and a functional capacities evaluation with some physical therapy, we can determine restrictions and level at activity with which the patient may return to the work force."

To resolve this conflict of medical opinion, the Office, pursuant to section 8123(a) of the Federal Employees' Compensation Act,[1] referred appellant, the case record and a statement of accepted facts to Dr. Steven C. Blasdell, a Board-certified orthopedic surgeon. In a report dated March 20, 1997, Dr. Blasdell reviewed appellant's history and prior medical evidence, and reported findings on physical examination and x-rays. Dr. Blasdell diagnosed lumbar spondylosis, chronic back pain behavior and intermittent left shoulder pain. Dr. Blasdell concluded:

> "According to the history provided, this patient sustained a soft tissue lower back injury or lumbar sprain. His magnetic resonance imaging (MRI) scan revealed lumbar spondylosis and a right parasagittal disc herniation. A left shoulder MRI scan revealed tenosynovitis. The left shoulder tenosynovitis and lumbar spine L5-S1 disc herniation were most likely preexisting conditions within a reasonable degree of medical certainty. His clinical findings are not consistent with an L5-S1 disc herniation. His physical examination reveals several nonphysiological findings including diffuse tenderness, even to light touch, a positive pelvic rotation test, and a positive axial compression test. These findings indicate the presence of symptom magnification and tend to decrease the credibility of his pain complaints. They are further substantiated by the findings of symptom magnification and inappropriate pain behavior on the February 28, 1995, functional capacity evaluation ordered by Dr. Morales. At this point, his ongoing lower back complaints are most likely related to his underlying lumbar spondylosis. He presented for examination using a cane. He is able to walk and stand without the cane. He has been out of work now for almost four years. He states he does not think he will ever go back to work as a rigger. Based on the length of time out of work and his personal expectations and goals regarding work, it is unlikely that he will ever return to work as a rigger. At this point, he has recovered from any soft tissue injury sustained as a result of the May 2, 1993, lifting episode at the Norfolk Naval Shipyard. Due to his underlying cervical and lumbar spondylosis, he will have difficulty performing the job requirements of a rigger. I recommend a lifting restriction of 30 pounds, based on his underlying osteoarthritis."

On May 9, 1997 the Office issued appellant a notice of proposed termination of compensation, on the basis that the residuals and disability resulting from his May 2, 1993 employment injury had ended. By decision dated July 22, 1997, the Office terminated appellant's compensation effective August 1, 1997 on this same basis.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. After it has determined that an employee has disability causally related

[1] 5 U.S.C. § 8123(a) states 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."

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.[2]

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation on August 1, 1997.

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.[3] The Office followed this procedure in referring appellant to Dr. Blasdell, a Board-certified orthopedic surgeon, to resolve the conflict of medical opinion between appellant's attending physician and the Office's referral physician. The report of Dr. Blasdell, however, is not sufficiently well rationalized to be given special weight.

Dr. Blasdell did not provide any rationale for his opinion that appellant's left shoulder tenosynovitis and his disc herniation at L5-S1 were preexisting conditions. Such rationale is especially important in this case, given that the Office accepted that appellant's employment injury resulted in his disc herniation and in impingement of the left shoulder. Dr. Blasdell also concluded that appellant had "recovered from any soft tissue injury sustained as a result of the May 2, 1993, lifting episode." However, as noted above, the Office accepted more than soft tissue injuries resulting from this employment injury, including authorizing surgery on appellant's left shoulder. Dr. Blasdell's comments on symptom magnification are not pertinent to the issue of causal relation; they may be pertinent to the issue of whether appellant has limitations for work, but Dr. Blasdell concluded that he does. Dr. Blasdell attributed these limitations to appellant's preexisting conditions, but, as noted above, the doctor did not provide any rationale explaining why these conditions, including one accepted by the Office as related to the employment injury, preexisted this injury.

[2] *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

[3] *James P. Roberts*, 31 ECAB 1010 (1980).

The decision of the Office of Workers' Compensation Programs dated July 22, 1997 is reversed.

Dated, Washington, D.C.
June 3, 1999

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member