

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JACK L. AIMAN and DEPARTMENT OF THE AIR FORCE,  
AIR NATIONAL GUARD, Natick, Mass.

*Docket No. 96-91; Submitted on the Record;  
Issued January 15, 1998*

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DECISION and ORDER

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

The issue is whether appellant had disability after June 14, 1994 due to his February 28, 1990 employment injury.

The Board has duly reviewed the case record in the present appeal and finds that appellant did not have disability after June 14, 1994 due to his February 28, 1990 employment injury.

Under the Federal Employees' Compensation Act,<sup>1</sup> when employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation for the periods of disability related to the aggravation.<sup>2</sup> However, when the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased.<sup>3</sup> Once the Office of Workers' Compensation Programs has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>4</sup> The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.<sup>5</sup> After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to the claimant. In order to prevail, the claimant must establish by the weight of the

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> *Richard T. DeVito*, 39 ECAB 668, 673 (1988); *Leroy R. Rupp*, 34 ECAB 427, 430 (1982).

<sup>3</sup> *Ann E. Kernander*, 37 ECAB 305, 310 (1986); *James L. Hearn*, 29 ECAB 278, 287 (1978).

<sup>4</sup> *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

<sup>5</sup> *Id.*

reliable, probative and substantial evidence that he or she had an employment-related disability which continued after termination of compensation benefits.<sup>6</sup>

In the present case, the Office accepted that appellant sustained a herniated disc at L3-4 when he slipped at work on February 28, 1990 and paid compensation for periods of disability. By decision dated June 14, 1994, the Office terminated appellant's compensation effective that date on the grounds that he no longer had disability due to his February 29, 1990 employment injury. The Office based its termination of appellant's compensation on the opinion of Dr. William F. Garrahan, a Board-certified orthopedic surgeon to whom it referred appellant for evaluation.<sup>7</sup> By decisions dated February 9 and September 20, 1995, the Office denied modification of its June 14, 1994 decision.

The Board notes that the Office met its burden of proof to terminate appellant's compensation effective June 14, 1994 by determining that that the weight of the medical evidence rested with the opinion of the Office referral physician, Dr. Garrahan. In a report dated June 25, 1993, Dr. Garrahan determined that appellant no longer had disability due to his February 28, 1990 employment injury and could return to his regular job as a warehouseman. The Board has carefully reviewed the opinion of Dr. Garrahan 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. Garrahan'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. Moreover, Dr. Garrahan provided a proper analysis of the factual and medical history and the findings on examination, including the results of diagnostic testing and reached conclusions regarding appellant's condition which comported with this analysis.<sup>8</sup> Dr. Garrahan provided medical rationale for his opinion by explaining that appellant did not exhibit any objective evidence of disability due to his February 28, 1990 employment injury. He noted that appellant did not exhibit any sensory or motor loss due to his herniated disc at L3-4 and indicated that he displayed some inconsistent and amplified findings upon examination.

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<sup>6</sup> *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

<sup>7</sup> The Office indicated that Dr. Garrahan served as an impartial medical examiner who resolved a conflict in the medical evidence, but he actually served as an Office referral physician. Appellant had previously been referred to Dr. James E. McLennan, a Board-certified neurosurgeon, who indicated in a January 21, 1992 report that he sustained an employment-related herniated disc at L3-4 on February 28, 1990. Dr. McLennan did not provide a clear opinion whether appellant had continuing disability due to his February 28, 1990 employment injury and his opinion was not in conflict with the opinions of appellant's attending physicians on the relevant issue of the present case. Section 8123(a) of the 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).

<sup>8</sup> See *Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

Prior to the termination of his compensation, appellant submitted an April 4, 1994 report of Dr. William F. Fishbaugh, Jr., an attending physician specializing in general practice. Dr. Fishbaugh noted that appellant had degenerative disc disease of the lumbosacral and thoracic spine and spinal stenosis at L3-4; he indicated that appellant could not perform his warehouseman position but that he could perform some type of modified duty. This report, however, is of limited probative value on the relevant issue of the present case in that it does not contain a clear opinion on the cause of appellant's continuing disability or otherwise indicate that appellant continued to be disabled due to his February 28, 1990 employment injury.<sup>9</sup>

After the Office's June 14, 1994 decision terminating appellant's compensation effective that date, appellant submitted additional medical evidence which he felt showed that he was entitled to compensation after June 14, 1994 due to residuals of his February 28, 1990 employment injury. Given that the Board has found that the Office properly relied on the opinion of Dr. Garrahan, in terminating appellant's compensation effective June 14, 1994, the burden shifts to appellant to establish that he is entitled to compensation after that date. The Board has reviewed the additional evidence submitted by appellant and notes that it is not of sufficient probative value to establish that he had residuals of his February 28, 1990 employment injury after June 14, 1994. Appellant submitted a November 16, 1994 report in which Dr. Fishbaugh indicated that he was totally disabled from all work, but Dr. Fishbaugh did not delineate the cause of this disability. Appellant also submitted a May 5, 1995 report in which Dr. Gabriel Abella, an attending physician Board-certified in physical medicine and rehabilitation, indicated that he was disabled from his warehouseman job. Dr. Abella did not provide a clear opinion that appellant was disabled due to his February 28, 1990 employment injury. He suggested that appellant was disabled due to "chronic pain syndrome" but the Office has not accepted that appellant sustained this condition due to employment factors and the medical evidence does not otherwise establish the existence of such an employment-related injury.

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<sup>9</sup> See *Charles H. Tomaszewski*, 39 ECAB 461, 467-68 (1988) (finding that medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

The decisions of the Office of Workers' Compensation Programs dated September 20 and February 9, 1995 are hereby affirmed.

Dated, Washington, D.C.  
January 15, 1998

George E. Rivers  
Member

David S. Gerson  
Member

A. Peter Kanjorski  
Alternate Member