U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DANNY R. TAGUE and DEPARTMENT OF THE ARMY,
HHD 734TH MAINTENANCE BATTALION, Newton, IA

Docket No. 99-206; Submitted on the Record;
Issued October 24, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
VALERIE D. EVANS-HARRELL

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation and medical benefits, effective December 8, 1996.

The Board has duly reviewed the case record in the present appeal and finds that the Office did not meet its burden of proof in terminating appellant's compensation and medical benefits.

On May 8, 1989 appellant, then a 42-year-old support service specialist, filed an occupational disease claim alleging that he sustained a temporary aggravation of degenerative arthritis of the left hip in the performance of duty. Effective May 3, 1989, appellant was placed on the periodic compensation rolls to receive compensation benefits for temporary total disability. By letter dated October 18, 1996, the Office advised appellant that it proposed to terminate his compensation benefits. By decision dated November 20, 1996, the Office determined appellant's compensation benefits should be terminated effective December 8, 1996. By letter dated January 14, 1997, appellant requested an oral hearing before an Office hearing representative and a hearing was held on May 5, 1998 at which time appellant testified. By decision dated June 19, 1998, the Office hearing representative affirmed the Office's November 20, 1996 decision.

It is well established that 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 is no longer related to the employment.[1]

[1] *See Alfonso G. Montoya*, 44 ECAB 193 (1992); *Gail D. Painton*, 41 ECAB 492 (1990).

In a report dated April 6, 1989, Dr. Martin S. Rosenfeld, appellant's attending orthopedic surgeon, provided a history of his condition and findings on examination and stated that x-rays revealed degenerative changes in both hips, the left worse than the right. He stated that the degenerative arthritis in appellant's left hip appeared to be progressing and he would probably need a total hip reconstruction in the next few years.

In notes dated June 19, 1989, Dr. Rosenfeld indicated that appellant was still disabled and required the use of crutches. He stated that the degenerative changes in his hip preceded his March 28, 1989 employment injury but his disabling symptoms did not appear until after the employment injury occurred.

In a report dated September 22, 1992, Dr. Rosenfeld stated that there had been no change in appellant's condition.

In a report dated June 2, 1994, Dr. John H. Kelley, a Board-certified orthopedic surgeon and Office referral physician, provided a history of appellant's condition and findings on examination and noted that appellant had preexisting advanced degenerative arthritis of both hips at the time of the 1989 employment injury. He indicated that appellant needed left and right total hip replacements. Dr. Kelley stated his opinion that appellant's condition would have progressed to the point where total hip replacement would become necessary regardless of the 1989 employment injury.

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."[2]

In this case, due to the conflict in medical opinion between Dr. Kelley, the Office referral physician and Dr. Rosenfeld, appellant's attending physician, as to whether appellant's employment-related disability had ceased, the Office properly referred appellant, together with a statement of accepted facts, copies of medical records and a list of questions to be answered, to Dr. John J. Dougherty, a Board-certified orthopedic surgeon, for an examination and evaluation in order to resolve the conflict in medical opinion.

Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[3]

In a report dated November 14, 1994, Dr. Dougherty related that he examined appellant on that date and provided a history of appellant's condition, course of treatment and findings on examination and diagnosed degenerative arthritis of both hips, left greater than that of the right. He noted that it was difficult to get a very coherent history from appellant. Dr. Dougherty stated:

[2] 5 U.S.C. § 8123(a).

[3] *Jack R. Smith*, 41 ECAB 691 (1990); *James P. Roberts*, 31 ECAB 1010 (1980).

"As far as partial or full recovery, I do not think he is ever going to recover fully. With no weight on his left lower extremity, he is certainly never going to be able to get back to work. The only way he could possibly get back to work is if he had some sort of a job where he could sit down. As far as does the diagnosis of aggravation of the degenerative arthritis in the hip continue to be work related, I think that this is of long-standing degenerative arthritis. Perhaps it was aggravated by the injury of jumping off the truck in 1989. It certainly appears to me that if it was work related and in the small little incident that he did that he should have been back the way he was before the jump.

"I do not exactly know the etiology of his degenerative arthritis, but unless one could definitely see different changes in his x-ray of his hip after he jumped than before one would have to say it is only an aggravation and certainly not caused by his work. I think his condition would be the same whether he had jumped or not. I think his jump probably was only a temporary aggravation and again, I can only say that is if he definitely had some changes on his x-rays after the jump than before. I just cannot seem to find that information and I am not sure any was ever given. I think the work activities caused a temporary aggravation of a preexisting condition. I do not think it is ever going to cease without any surgery. I think his condition deteriorated just because it is going to continue to deteriorate with the passage of time regardless of whether he is working or not. Diagnosis of any condition still remaining, perhaps some aggravation of preexisting condition, but I think the condition would have been the same whether he had jumped or not. I certainly agree with Dr. Kelley."

The Board finds that Dr. Dougherty's opinion is not entitled to the special weight generally accorded that of an impartial medical specialist due to several deficiencies. He indicated that he was not able to obtain a coherent history of the condition from appellant. Therefore, it is possible that Dr. Dougherty did not base his opinion upon a complete and accurate factual background. He stated that he thought that appellant sustained a temporary aggravation of a preexisting condition and then, in the next sentence, stated that he did not think that "it is ever going to cease without any surgery." Thus, Dr. Dougherty appears to be stating that the temporary aggravation has not ceased. If the temporary aggravation had ceased, he did not indicate when he felt the temporary aggravation had ceased, as specifically requested by the Office and he did not provide sufficient medical rationale to explain why appellant's continuing left hip problems were due only to the preexisting degenerative arthritis rather than to the 1989 employment injury. Due to these deficiencies, the impartial medical examination and evaluation by Dr. Dougherty did not resolve the conflict in medical opinion in this case and, therefore, the Office did not meet its burden of proof in terminating appellant's compensation and medical benefits.

The decision of the Office of Workers' Compensation Programs dated June 19, 1998 is reversed.

Dated, Washington, DC
October 24, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Valerie D. Evans-Harrell
Alternate Member