

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHNNY L. SAMMONS and DEPARTMENT OF THE AIR FORCE,
ROBINS AIR FORCE BASE, Warner-Robins, GA

*Docket No. 00-524; Submitted on the Record;
Issued January 5, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation.

On January 8, 1997 appellant, then a 28-year-old aircraft worker, was working on a scaffold when the scaffold collapsed. He fell to the ground and developed low back pain. The Office accepted appellant's claim for a lumbar strain. Appellant received intermittent continuation of pay for the period January 13 through March 2, 1997. The Office began payment of temporary total disability compensation effective March 3, 1997.

In a July 10, 1998 decision, the Office terminated appellant's compensation effective July 16, 1998 on the grounds that the residuals of appellant's employment injury had resolved. In a December 28, 1998 letter, appellant requested reconsideration. In a February 23, 1999 merit decision, the Office denied appellant's request for modification of the July 10, 1998 decision. In a September 21, 1999 letter, appellant again requested reconsideration. In an October 7, 1999 merit decision, the Office again denied appellant's request for reconsideration.

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

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 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.¹

In a February 28, 1997 report, Dr. Julian M. Earls, a neurologist, noted that appellant had lumbar pain radiating down his legs. Dr. Earls diagnosed degenerative disc disease and lumbar

¹ Jason C. Armstrong, 40 ECAB 907 (1989).

facet arthropathy. In an April 17, 1997 report, he indicated that a January 30, 1997 magnetic resonance imaging (MRI) scan was negative as was a January 31, 1997 computerized tomography (CT) scan. He noted, however, that an electromyogram (EMG) showed an S1 denervation pattern.

The Office referred appellant to Dr. Thomas Whitesides, a Board-certified orthopedic surgeon, for an examination and second opinion. In an October 14, 1997 report, Dr. Whitesides indicated that appellant had low thoracic pain and tenderness to palpation. In a November 25, 1997 report, Dr. Whitesides reported that a second CT scan and a bone scan were within normal limits, showing no lesions or fracture. An Office claims examiner, in a January 28, 1998 letter, asked whether appellant had any objective evidence of disability and whether the strain appellant had sustained on January 8, 1997 had resolved. In a February 2, 1998 memorandum, the claims examiner noted that Dr. Whitesides had called her in reference to the January 28, 1998 letter. He indicated that he had been unaware that the Office had requested a second opinion from him regarding appellant, noting that he apparently had not received the Office's letter requesting such an examination. The claims examiner reported that Dr. Whitesides stated appellant only had subjective complaints of pain with no objective evidence of disability. She related that the doctor indicated that appellant had no objective evidence to show any residuals from the strain he had sustained a year previously. The Office subsequently received a copy of the January 28, 1998 letter from Dr. Whitesides who answered "no" to the question of whether appellant had any objective evidence of disability and "probably" to the question of whether the strain appellant had sustained had resolved.

The Office requested further comment from Dr. Earls. In a February 10, 1998 report, Dr. Earls indicated that appellant had a throbbing achiness involving the lower back with numbness and tingling extending down the posterior lateral aspect of the left leg. He noted that sensory examination showed some decrease in pinprick primarily involving the lateral aspect of the right leg. Dr. Earls commented that appellant continued to complain of subjective back pain with radiation down the right leg. He noted that all objective tests had been unremarkable except for the EMG. Dr. Earls stated that the lumbar strain sustained on January 8, 1997 had improved. He commented that appellant's complaints of continued pain down the right leg suggested a problem that was missed by the MRI scan. Dr. Earls stated that appellant's degenerative disc disease and lumbar facet arthropathy were not caused by the employment injury but were preexisting conditions that were aggravated by the employment injury. He indicated that appellant would most likely be able to perform some type of work. Dr. Earls stated appellant should avoid jobs that required prolonged standing or sitting but required a job which allowed flexibility to sit and stand as needed.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Robysina L. James, a Board-certified orthopedic surgeon, for an examination to resolve the conflict in the medical evidence between Drs. Whitesides and Earls. In an April 30, 1998 report, Dr. James indicated that all tests, including MRI scans, CT scans, bone scans and the EMG were negative. She indicated that sensation was intact to touch and pinprick in all dermatomes of the arms and legs. Dr. James found no significant thoracic or lumbar paraspinal muscle spasm. She noted that he had point tenderness in the thoracic spine. Dr. James concluded that appellant's lumbar strain, caused by the January 8, 1997 employment injury, had resolved. She indicated that she saw no relationship between appellant's current complaints of

thoracic pain and the employment injury. Dr. James stated that there was no objective evidence that the residuals of the employment injury continued to exist or that the employment injury aggravated appellant's preexisting degenerative disc disease or lumbar facet arthropathy.

In an August 3, 1998 report, Dr. Earls stated that a May 22, 1998 myelogram showed an annular bulge at L3-4 and prominent central posterior protrusion of the L4-5 disc producing an indentation of the thecal sac. He noted that the radiologist suggested appellant had a subligamentous disc herniation. Dr. Earls stated that the back pathology could be related to the January 8, 1997 employment injury as appellant did not complain of back pain before that date. In a November 30, 1998 report, he stated that the myelogram findings most likely showed an aggravation of a preexisting condition after an employment-related accident. Dr. Earls concluded that appellant continued to suffer from residuals of the employment injury.

The Office's decision was based on the conclusion that the report of Dr. James, acting as an impartial medical specialist, resolved a conflict in the medical evidence between Drs. Whitesides and Earls. A review of the record, however, shows that Dr. Whitesides' written report on the issues of whether appellant had any objective evidence of disability and whether the effects of the employment injury had resolved consisted of one word answers on a copy of the letter sent to him by the Office. The only report of Dr. Whitesides' rationale for his opinion was cited in a memorandum of a telephone conversation he had with an Office claims examiner. A report of an oral conversation of medical rationale is not sufficiently reliable to find that the written report of this case was adequate to cause a conflict in the medical evidence. Such a medical report, with rationale, must be in writing before it can be considered as probative, reliable medical evidence. The description of Dr. Whitesides' oral report, therefore, was insufficient to cause a conflict in the medical evidence. As a result, Dr. James cannot be considered an impartial medical specialist.

Dr. James found that the EMG was negative and that appellant had normal sensation to the pinprick test of the legs. Dr. Earls stated that the EMG showed S1 denervation and reported that the pinprick test showed a loss of sensation down the lateral aspect of the right leg. Dr. James stated that appellant's employment-related condition had resolved but Dr. Earls concluded that appellant still had some residuals from the employment injury. The reports of Drs. James and Earls, therefore, created a conflict in the medical evidence. The case must therefore be remanded for referral of appellant to a proper impartial medical specialist for an examination. The impartial medical specialist should be asked to describe the findings on examination, provide a diagnosis of appellant's condition and give his opinion on whether appellant has any disability or residuals remaining from the effects of the employment injury.

The decisions of the Office of Workers' Compensation Programs dated October 7 and February 23, 1999 are hereby reversed.

Dated, Washington, DC
January 5, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member