U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RUDY L. CLEMENS and DEPARTMENT OF THE NAVY,
NAVAL SHIPYARD, Long Beach, CA

Docket No. 99-1977; Submitted on the Record;
Issued September 21, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits.

On July 1, 1987 appellant, a 40-year-old welder, injured his lower back while swinging a 15- to 20-pound hammer. Appellant filed a claim for benefits on July 2, 1987, which the Office accepted for low back strain. Appellant has not returned to work since the date of injury. The Office placed him on the periodic rolls and paid him appropriate compensation for total disability and medical benefits.

In order to determine appellant's current condition and whether he still suffered residuals from his July 1, 1987 employment injury, the Office scheduled a second opinion medical examination with Dr. Hugh E. Smith, a Board-certified orthopedic surgeon. In a report dated March 1, 1994, Dr. Smith reviewed appellant's medical records and a statement of accepted facts, indicated findings on examination and stated that there was insufficient objective evidence to support the magnitude of his subjective complaints. He noted that appellant had a permanent partial disability of no heavy lifting, repeated bending and stooping, but was capable of performing some work activities. Dr. Smith recommended that appellant commence participation in a vocational rehabilitation program.

In a report dated May 5, 1994, Dr. Luis Spamer, a specialist in physical medicine and rehabilitation and appellant's treating physician, stated that appellant had complaints of increased, constant and severe low back pain with numbness, tingling and a burning sensation.

In a report dated December 13, 1994, Dr. Spamer stated that appellant was being reexamined for renewed complaints of increased low back pain. He noted his disagreement with Dr. Smith's conclusions:

> "Despite Dr. Hugh Smith's physical findings, such as decreased range of motion on various parts of the body, sensory findings, etc., he attributes all these deficits to what he refers to as nonphysiologic and does not seem to find any objective evidence sufficient to support [appellant's] subjective complaints. This is indeed due to the fact that Dr. Hugh Smith does not seem to understand the nature of [appellant's] chronic painful syndromes, namely the presence of neuropathic type of pain or radiculopathies, which will continue to be symptomatic and persists as a result of this repetitively documented objective imaging studies, such as the [magnetic resonance imaging scan] [computerized tomography] scan, etc….
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> "It has been noted previously that [appellant] is in need of continuous medical care, which should consist of physical therapy and medication to obtain at least temporary relief of his condition, although due to the nature of his injuries, with the presence of the neuropathic type of pain and lumbosacral radiculopathies, it is not anticipated that his treatments would 'cure' his condition unless he has relief of the 'irritating factors' that continue to perpetrate the presence of symptomatic radiculopathy, such as surgery. In the meantime, [appellant] should continue to be treated as indicated in order to prevent serious recurrences with increase in further disability and to ameliorate suffering."

Dr. Spamer reiterated his disagreement with Dr. Smith's opinion in a July 7, 1995 report. He stated that he disagreed with Dr. Smith that appellant was capable of participating in a vocational rehabilitation program and advised that despite numerous objective findings, Dr. Smith still did not understand appellant's conditions.

On September 7, 1995 the Office determined that there was a conflict in the medical evidence regarding whether appellant was currently totally disabled due to his accepted 1987 employment injury and scheduled an independent medical examination with Dr. William G. Peacher, a Board-certified neurosurgeon and Dr. Ronald D. Levin, Board-certified in physical medicine and rehabilitation.

In a report dated October 3, 1995, Dr. Levin stated that appellant should be precluded from any heavy lifting, repetitive bending or stooping, but advised that he should be able to participate in a vocational rehabilitation program for eight hours per day. He also opined that appellant could return to a modified, less strenuous type of job and did not require any further diagnostic tests or physical therapy.[1]

By letter dated August 22, 1997, the Office advised appellant that, based on the referee medical examinations and reports of Drs. Levin and Peacher, which represented the weight of the

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[1] The report was signed by Dr. Levin and typewritten on stationary with Dr. Preacher's name printed in the heading.

medical evidence, it had determined that he was capable of working at a position within his accepted physical restrictions and was referring him for vocational rehabilitation.

In a memorandum dated October 24, 1997, the Office stated that appellant required updated medical restrictions regarding appellant's ability to perform part-time employment, as the restrictions outlined by the referee medical examiners were now two years old.

On November 4, 1997 the Office referred appellant for a second opinion examination with Dr. Ibrahim M. Yashruti, a Board-certified orthopedic surgeon, in order to determine whether he still had residuals from the 1987 work injury and, if so, whether he was capable of participating in vocational rehabilitation.

In a report dated November 27, 1997, Dr. Yashruti stated that there were no objective findings to show that appellant had residuals from the July 1987 work injury, although he had subjective complaints of constant low back pain, relieved partially by lying down and taking medication, with limited low back motion on examination. He stated that appellant had had physical limitations of standing and walking of four hours per day; occasional bending, stooping, kneeling and climbing and limited lifting, not to exceed 20 pounds on occasion and 10 pounds with frequency. Dr. Yashruti advised that appellant had good potential for vocational rehabilitation.

In a notice of proposed termination dated December 15, 1997, the Office, relying on Dr. Yashruti's opinion, found that the weight of the medical evidence demonstrated that appellant no longer had any residuals from the July 1, 1987 employment injury. The Office allowed appellant 30 days to submit additional evidence or legal argument in opposition to the proposed termination. Appellant did not submit additional evidence within 30 days.

By decision dated January 16, 1998, the Office terminated appellant's compensation and entitlement to medical benefits.

In a letter received by the Office on March 2, 1998, appellant requested a review of the written record. In support of his claim, appellant submitted a December 29, 1997 report from Dr. Spamer, which was received by the Office on February 25, 1998. He advised that appellant's low back pain was still constant and radiated to both lower extremities, mainly to the left, with burning pain in his toes and numbness and tingling. Dr. Spamer stated that the pain was increased by forward bending, sitting and walking. He stated that appellant was still permanently totally disabled and required continued medical treatment.

By decision dated July 9, 1998, an Office hearing representative affirmed the Office's January 16, 1998 termination decision.

The Board finds that the Office failed to meet its burden of proof to terminate appellant's compensation benefits.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[2]

[2] *Mohamed Yunis,* 42 ECAB 325, 334 (1991).

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.[3]

In this case, the Office improperly determined in its January 16, 1998 decision, that appellant was no longer entitled to total disability compensation based on the referral opinion of Dr. Yashruti. He found no objective findings to show residuals from the employment-related 1987 injury. However, Dr. Yashruti did not explain why appellant had limited low back motion on examination, physical limitations on standing and working for four hours per day and continued lifting restrictions. He did not specifically state that appellant had recovered from his employment injury, could return to his date-of-injury position and was no longer in need of medical care. The fact that Dr. Yashruti reported that appellant was a candidate for vocational rehabilitation strongly suggests that appellant continued to be at least partially disabled and that his medical benefits should not have been terminated.

In a medical report received subsequent to Dr. Yashruti's November 4, 1997 report, Dr. Spamer stated in his December 29, 1997 report that appellant continued to have constant low back pain radiating to both lower extremities and burning pain in his toes, with numbness and tingling. He also noted that appellant's pain was increased by forward bending, sitting and walking. Dr. Spamer concluded that appellant was still permanently totally disabled and required continued medical treatment.

Accordingly, the Board finds that the report of Dr. Yashruti does not represent the weight of the medical evidence and is insufficiently rationalized to justify termination of appellant's compensation benefits.

The Office of Workers' Compensation Programs' decision of July 9, 1998 is reversed.

Dated, Washington, DC
September 21, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

[3] *Id.*