

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN SPADEA and DEPARTMENT OF THE NAVY,
NAVAL SHIPYARD, Philadelphia, PA

*Docket No. 03-1191; Submitted on the Record;
Issued September 29, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

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

This case has previously been before the Board. By decision dated August 5, 1988, the Board affirmed the Office's reduction of appellant's loss of wage-earning capacity.¹ By decision dated November 2, 1993, the Board reversed the Office's decisions dated April 28 and August 3, 1992, which terminated appellant's benefits.² The Board's previous decisions set forth the facts and circumstances of the case up to that time and they are incorporated herein by reference.

To briefly summarize the facts, on November 14, 1980 appellant, while in the performance of duty, injured his lumbar spine. The injury was accepted for a lumbar sprain. On April 12, 1982 appellant injured his shoulder and back while pulling some file cabinet drawers. This injury was accepted for tendinitis of the right shoulder, myositis and a lumbar sprain. On June 11, 1991 appellant's treating Board-certified orthopedic surgeon, Dr. Parviz Kambin, performed a bilateral hemilaminectomy and decompression of the L5 root on both sides on appellant. Appellant continued under Dr. Kambin's care. In a report dated April 21, 1999, he indicated that appellant still had residual difficulties in the lower back area and hips. In a June 23, 1999 report, Dr. Kambin indicated:

“[Appellant's] response to treatment has been satisfactory. His radicular pain has ceased[,] however, he has continued to have recurrent episodes of pain in the low[er] back area which has been managed with anti-inflammatory medication.

“Recently [appellant] has been having pain in his right shoulder. He should see an orthopedic surgeon who specializes in shoulder injuries. I provided [appellant]

¹ Docket No. 88-598 (issued August 5, 1988).

² Docket No. 93-606 (issued November 2, 1993).

with the name of Brian Sennett, M.D. at Hahnemann Hospital who may choose to consult.”

Dr. Kambin noted that he was “winding down my practice” and indicated that he would no longer be treating appellant. On October 4, 1999 the Office wrote a letter to Dr. Kambin asking that he answer questions regarding appellant’s condition. Appellant was not sent a copy of this letter. Dr. Kambin did not respond to the letter.

On May 2, 2001 the Office referred appellant to Dr. Steven Valentino, an osteopath, for a second opinion. In a report dated May 30, 2001, he concluded:

“Based on today’s evaluation, [appellant’s] diagnosis referable to his work injury is that of tend[i]nitis and myositis about the right shoulder which has resolved. Additionally his diagnosis regarding his work[-]related low back injury is one of [a] lumbosacral strain as the diagnostic studies subsequent to his history of work injury revealed no evidence of any acute or traumatic injury. Specifically, there is no evidence of disc herniation or nerve root impingement. In fact, [a] review of the operative report by Dr. Kambin of June 11[,] [19]91 confirms under direct visualization [that] there was no low back pain along with degenerative changes as well as other nonindustrial-related factors which would lead me to recommend a light[-]duty, full[-]time position. However, I cannot find any residuals from [appellant’s] history of work[-]related injury and find he has reached maximum medical improvement without need for ongoing supervised medical care or treatment. He does not continue to suffer residuals from the history of work injury based on normal objective findings and review of diagnostic studies.”

By letter dated July 27, 2001, the Office asked Dr. Kambin for his comments on Dr. Valentino’s report. Again, no copy of this letter was sent to appellant. Dr. Kambin did not respond to the inquiry.

On September 17, 2001 the Office issued a notice of proposed termination of compensation. The Office noted that the weight of the medical evidence was represented by the opinion of Dr. Valentino, the physician to whom appellant was referred for an “[i]ndependent [m]edical [e]xamination,” who noted that appellant had no continuing disability as a result of the injuries of November 14, 1980 and April 12, 1982. By decision dated October 24, 2001, the termination of benefits was made final effective November 4, 2001.

By letter dated October 2, 2002, appellant, through his attorney, requested reconsideration. In support of his claim for reconsideration, appellant submitted narrative reports by Dr. Kambin, already in the record. He also submitted reports indicating that he was also treated by Dr. Sennett, a Board-certified orthopedic surgeon, for a small right rotator cuff tear. In his final report, dated February 15, 2000, Dr. Sennett noted that, at this time, appellant’s only limitations were forward flexion and external rotation. He noted that, with regard to his shoulder, appellant could work at this time, but that he was out of work due to other injuries.

At the request of his attorney, appellant was examined by Dr. David Weiss, an osteopath. In his March 25, 2002 report, he noted that the work-related injuries of April 12, 1982 and

November 14, 1980 were the competent producing factors for appellant's current subjective and objective complaints. Dr. Weiss noted that appellant ambulated with a forward-flexed gait, exhibited a right lower extremity list and could not perform either calcaneal or equines gaits. He noted that there was bilateral iliolumbar tenderness, spasm and posterior superior iliac spine tenderness. Dr. Weiss also noted range-of-motion restrictions involving flexion, backward extension, left lateral flexion and right lateral flexion. He noted that all ranges of motion were carried through with pain at the extremes. Dr. Weiss concluded that appellant had a 4 percent impairment to his right upper extremity and a 19 percent impairment to his left lower extremity.

By decision dated January 3, 2003, the Office reviewed appellant's case on the merits, but determined that the evidence submitted was insufficient to warrant modification of its prior decision.

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

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.³ After it has been determined that a claimant had disability causally related to his federal employment, the Office may not terminate compensation without establishing that disability has ceased or that it is no longer related to employment.⁴ To terminate authorization for medical treatment, the Office has the burden of establishing that appellant no longer has residuals of the employment-related condition that requires further medical treatment.⁵ Furthermore, 5 U.S.C. § 8123(a) states in pertinent part: "[I]f there is a 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."⁶

In the instant case, the Office, due to numerous errors, improperly terminated appellant's benefits. For example, the last report by appellant's treating physician, Dr. Kambin was dated June 23, 1999. In that report, Dr. Kambin indicated that, although appellant's radicular pain had ceased, he continued to have recurrent episodes of pain in the low back area." Dr. Kambin also noted that he would no longer be treating appellant, as he was "winding down" his practice. Subsequent to this report, the Office sent two letters to Dr. Kambin wherein it requested that he provide further opinions; Dr. Kambin responded to neither letter. Appellant was not sent a copy of these letters. Pursuant to the Office procedure manual,⁷ when the claims examiner requests further information from a physician, appellant must be sent a copy of the letter. Accordingly, appellant would not have known that his physician never responded to these letters, thereby depriving him of the opportunity to take further action. Furthermore, the Board notes that the

³ *Theodore Parker*, 50 ECAB 542, 547 (1999).

⁴ *Id.*

⁵ *Jose Hernandez*, 47 ECAB 288, 295 (1996).

⁶ *See also Craig M. Crenshaw, Jr.*, 40 ECAB 919, 922 (1989).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.5(b) (September 1993).

Office clearly referred appellant to Dr. Valentino for a second opinion examination. However, in the notice of proposed termination decision, the Office indicates that it had referred appellant to Dr. Valentino for an “[i]ndependent [m]edical [e]xamination.” The weight to be accorded to second opinion physician differs from the weight to be accorded an independent medical examiner. Although the Office indicates that the weight of the medical evidence rested with Dr. Valentino, it is not clear whether the Office improperly gave the greater weight to Dr. Valentino because it had improperly noted him to be an independent medical examiner. The Board further notes the apparent conflict between the opinion of Dr. Kambin, who in his report dated June 23, 1999, indicated that appellant continued to have recurrent episodes of pain in the low back, and the May 30, 2001 report of Dr. Valentino, wherein he indicated that appellant did not continue to suffer residuals from the work injury. Although there is a two-year period between these reports, Dr. Kambin’s report was still sufficient to establish a conflict in medical evidence and this case should have been referred to an independent medical examiner to resolve the conflict.⁸ Accordingly, the Office improperly terminated appellant’s benefits.

The decision of the Office of Workers’ Compensation Programs dated January 3, 2003 is hereby reversed.

Dated, Washington, DC
September 29, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

⁸ *John J. Carlone*, 41 ECAB 354 (1989).