

FACTUAL HISTORY

On October 11, 2000 appellant, then a 54-year-old painter, filed an occupational disease claim alleging that he developed a neck injury, shoulder disease and tennis elbow, causally related to his job duties over the preceding 15 years.¹ On September 17, 2001 appellant filed a traumatic injury claim alleging that on September 13, 2001 while working on a platform installing large and heavy storm windows, he injured his lower back and neck. On October 29, 2001 the Office accepted that appellant sustained bilateral epicondylitis and aggravation of cervical arthritis, causally related to his employment duties. On January 3, 2002 the Office accepted that appellant sustained a lumbar strain on September 13, 2001. He received compensation on the periodic rolls.

Appellant received treatment for his lateral epicondylitis since October 2, 2000, and treatment for cervical, right shoulder and right hand numbness since November 27, 2000. Physical therapy was received from May 11 through October 22, 2001, and medical appointments for all conditions continued through December 17, 2001. On February 13, 2002 appellant was seen by Dr. Matthew K. Hermann, a physician of unlisted specialty,² who opined that he had reached maximum medical improvement relative to the September 13, 2001 lumbar strain injury.

On September 16, 2002 Dr. Dennis L. Noteboom, a family practitioner, completed an OWCP-5 work restriction evaluation indicating that appellant could work light-duty desk work for four hours per day for two months. Dr. Noteboom opined that appellant would not be capable of returning to his former job as a painter, and he noted that appellant's health issues revolved around his inability to fully move his neck due to cervical arthritis.

On September 18, 2002 appellant was seen by Dr. Hermann who released him to work with physical restrictions. Appellant participated in vocational rehabilitation job placement services from December 28, 2002 to March 28, 2003. On January 10, 2003 Dr. Noteboom saw appellant and opined that he could not do anything that involved any type of labor; lifting, climbing, standing and sitting were permanently restricted.

On April 18, 2003 the Office referred appellant to Dr. Dean C. Sukin, a Board-certified orthopedic surgeon, for a second opinion examination.

By report dated May 2, 2003, Dr. Sukin reviewed appellant's medical history, reported findings on physical examination, and opined that appellant had degenerative disc disease at L4-5 with facet joint changes, pain from a cervical strain, mechanical low back pain without focal neurologic loss or radiculopathy, and bilateral epicondylitis. Dr. Sukin noted that appellant's lateral epicondylitis was directly related to repetitive painting, that he had cervical

¹ Appellant's claim was initially denied by decision dated January 2, 2001 but following a requested oral hearing, on August 24, 2001 the hearing representative found that he had presented sufficient evidence to establish his claim, and the case was remanded for payment of compensation benefits.

² Dr. Herman does not appear in the American Medical Association's Directory of Physicians in the United States.

and lumbar strain/sprain from lifting heavy storm windows, a preexisting T-12 compression fracture, and degenerative disc disease at L4-5 with facet joint arthritis which caused 90 percent of his low back condition and 10 percent of that condition being work related. He noted that appellant's elbow condition was 100 percent related to his job, and that he continued to have residuals from his work-related elbow condition. Dr. Sukin opined that appellant's cervical and lumbar spine conditions were medically stable and stationary, that adequate neck x-rays were needed for a definitive cervical diagnosis and that appellant's back was at maximum medical improvement such that he was at his preinjury status at that point in time. He opined that appellant sustained an aggravation of the underlying degenerative disc disease in the lumbar spine, that appellant's neck condition was a temporary aggravation which had reached maximum medical improvement, and that, although he had reached maximum medical improvement with regard to his back, his elbows were not at maximum medical improvement. Dr. Sukin completed a work capacity evaluation noting that appellant could work eight hours per day, sit for two hours per day, stand for two hours per day, and twist for two hours per day, he could perform repetitive elbow movements for one hour per day and squat one hour per day. Appellant could push, pull, kneel and climb for one half-hour per day. He further noted that appellant could lift for 1 hour per day with a 20-pound lifting limit, and that he needed to take a 15-minute break every 2 hours.

On July 15, 2003 the Office determined that there was a conflict in medical opinion evidence between Dr. Noteboom, appellant's treating physician, and Dr. Sukin, the second opinion specialist, on whether or not appellant could perform sedentary work. It noted that Dr. Noteboom opined that appellant could not work and had permanent restrictions, but Dr. Sukin opined that appellant could work eight hours per day with restrictions.³ The Office referred appellant, together with a statement of accepted facts and questions to be addressed, to Dr. James R. Burton, a Board-certified orthopedic surgeon, selected to resolve the conflict in medical evidence.

By report dated August 11, 2003, Dr. Burton reviewed appellant's medical history and the statement of accepted facts, reviewed the medical reports and diagnostic examinations of record, noted appellant's elbow complaints and left L5-S1 facet joint area pain. The physician reported largely normal results on physical examination and opined that appellant had degenerative disc disease at C5-6, a history of bilateral lateral epicondylitis, a history of right shoulder pain, and left lower lumbar pain most likely due to degenerative disc joint disease at the left L5-S1 facet joint. Dr. Burton noted that, other than the objective finding of degenerative disc disease on appellant's cervical x-rays, there was very little present to indicate disability. He was not sure of the cause of appellant's left lower lumbar pain. Dr. Burton opined that it was hard to identify any reason why appellant could not do "his job of injury." He recommended further treatment including a sedimentation rate to rule out multiple myeloma as the cause of his

³ On June 25, 2003 the Office made a preliminary determination that appellant had received an overpayment of compensation in the amount of \$163.38, which occurred because the Office improperly failed to collect insurance premiums for the period January 19 to May 17, 2003. Appellant was found to be without fault in the creation of this overpayment. He did not reply to the Office's preliminary notice. By decision dated December 10, 2003, the Office finalized this overpayment, but determined that the collection of the overpayment would be terminated as the specific actions needed to process and collect this debt would likely exceed the debt. As appellant, was not adversely affected by the decision, it is not on appeal before the Board at this time. *See* 20 C.F.R. § 501.3(a).

objective osteopenia, a local anesthetic/steroid injection into the left L5-S1 facet joint for his low back pain, steroid injections into the lateral condyles, which were the normal treatment for lateral epicondylitis, and a “tennis elbow splint” just below the elbow to stabilize the muscles in that area and to prevent symptoms of lateral epicondylitis.

Dr. Burton indicated that he did not agree with Dr. Noteboom, as his examination of appellant was basically normal. He could not find any objective evidence to indicate that appellant was not able to do his usual work at the employing establishment. Dr. Burton opined that appellant certainly could have a mild recurrent epicondylitis that flared up when he painted, but that he could not demonstrate that on examination. He opined that appellant might qualify for some restrictions regarding repetitive use of his hands, if he continued to insist that painting caused pain in his elbows, that some mild restrictions might be given to repetitive heavy lifting in regards to his low back pain complaints, and that he also would have restrictions with cervical extension and repetitive looking up. Dr. Burton was not sure why appellant could not do medium type work and opined that appellant’s bilateral epicondylitis of the elbows was resolved. He concluded that appellant had no objective findings and no residuals from his August 14, 2000 and September 13, 2001 work injuries, that he had reached maximum medical improvement at that time, and that the only treatment that would enable appellant to return to work were symptomatic treatments identified above. Dr. Burton completed an OWCP-5 work capacity evaluation form indicating that there were no limitations on any of the identified activities except for self-imposed limitations, and that there was no reason appellant could not work eight hours per day.

The Office provided appellant with a September 10, 2003 notice of proposed termination of compensation and medical benefits on the grounds that the weight of the medical evidence of record supported that he had no objective evidence of any disabling condition and that he required no further treatment for his resolved conditions. The Office provided appellant 30 days within which to disagree and to submit further medical evidence supporting ongoing disability or injury residuals.

Appellant responded by letter dated October 1, 2003 disagreeing with the proposed termination and requesting a schedule award. By response dated October 15, 2003, the Office advised appellant that he had not provided any medical evidence supporting that he had a permanent impairment causally related to his accepted conditions. On October 15, 2003 the Office finalized the termination of wage-loss compensation and medical benefits, finding that the weight of the medical evidence of record established that he had no further disability for work or injury residuals which required further medical treatment.

By decision dated January 8, 2004, the Office denied appellant’s entitlement to a schedule award, on the grounds that he had no impairment causally related to his accepted employment conditions.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.⁴ 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.⁵ Further, the right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for wage loss.⁶ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition that require further medical treatment.⁷

The Federal Employees' Compensation Act,⁸ at 5 U.S.C. § 8123(a), in pertinent part, provides: "If 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." Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.⁹

ANALYSIS -- ISSUE 1

In this case, the Office properly found that there arose a conflict in medical opinion evidence between Dr. Noteboom, appellant's treating physician, and Dr. Sukin, the second opinion orthopedic specialist, on the issue of whether appellant was capable of returning to work on a full-time basis. Dr. Noteboom opined that appellant could return to work for four hours per day with permanent restrictions on any type of physical labor. Dr. Sukin, however, opined that appellant could work eight hours per day performing some physical labor for limited periods with some activity restrictions. The Office, therefore, properly referred appellant to Dr. Burton for an impartial medical examination.

Dr. Burton provided a detailed report in which he reviewed the evidence of record and presented his findings upon physical examination. Dr. Burton opined that, other than the objective finding of degenerative disc disease on appellant's cervical x-rays, there was very little present to indicate a disability. His examination found that appellant was basically normal, and

⁴ *Gloria J. Godfrey*, 52 ECAB 486 (2001).

⁵ *Id.*

⁶ *Manuel Gill*, 52 ECAB 282 (2001).

⁷ *Id.*

⁸ 5 U.S.C. §§ 8101-8193.

⁹ *Gloria J. Godfrey*, *supra* note 4.

he explained that he could find no objective evidence to indicate that appellant was not able to do his usual work at the employing establishment for eight hours per day. Dr. Burton opined that appellant had no objective findings and no residuals from his August 14, 2000 or September 13, 2001 work injuries, that he had reached maximum medical improvement at that time, and that the only treatment that would help appellant to return to work were the symptomatic treatments such as anesthetic/steroid injections into painful regions as necessary and the use of a tennis elbow splint. He completed a work capacity evaluation indicating that appellant could work eight hours per day without limitations on any of the identified activities, except for appellant's self-imposed limitations.

As the report from the impartial medical examiner, Dr. Burton, was based on an accurate factual and medical background, and was comprehensive, complete, and well rationalized, based on the absence of physical or objective findings upon examination, it is entitled to that special weight accorded a well-rationalized impartial medical report. As the impartial medical examiner's report is entitled to that special weight, it constitutes the weight of the medical opinion evidence of record and establishes that appellant can work an eight-hour day without significant limitations, and that he needs no further medical treatment as he has no objective injury-related residuals requiring such treatment.¹⁰

Therefore, the Office met its burden of proof to terminate appellant's wage-loss compensation and entitlement to further medical benefits, based upon the impartial medical report from Dr. Burton.

LEGAL PRECEDENT -- ISSUE 2

A claimant seeking compensation under the Act has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence,¹¹ including that the claimant is an "employee" within the meaning of the Act and that the claim was filed within the applicable time limitation of the Act.¹² The claimant must also establish that he or she sustained an injury in the performance of duty as alleged and that his or her disability, if any, was causally related to the employment injury.¹³ Section 8107 provides that if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.¹⁴

¹⁰ *Id.*

¹¹ *Roger Williams*, 52 ECAB 468 (2001).

¹² *Gary J. Watling*, 52 ECAB 278 (2001). *See* 5 U.S.C. § 8122.

¹³ *Id.*; *Elaine Pendleton*, 40 ECAB 1143 (1989).

¹⁴ 5 U.S.C. § 8107(a).

The schedule award provision of the Federal Employees' Compensation Act¹⁵ and its implementing federal regulation¹⁶ provide for payment of compensation for the permanent loss or loss of use of specified members, functions and organs of the body. No schedule award is payable for a member, function, or organ of the body not specified in the Act or in the regulations.¹⁷ Because neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back,¹⁸ no claimant is entitled to such an award.¹⁹

However, in 1966, amendments to the Act modified the schedule award provision to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. As the schedule award provision of the Act include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.²⁰

ANALYSIS -- ISSUE 2

The medical evidence in this case supports that appellant had a cervical spine, lumbar spine and upper extremity conditions accepted as being employment related. However, the weight of the medical evidence as reported by Dr. Burton, the impartial examiner, establish that appellant had no impairment related to his accepted conditions which would support a schedule award. Appellant has not submitted any rationalized medical evidence based upon objective findings, which establishes that he has any permanent impairment of either upper extremity, for which a schedule award might be granted.

Although, appellant contended that he has permanent impairment of the cervical and/or lumbar spine, the Act does not provide for a schedule award for the back or spine. While, impairment of the upper or lower extremities due to a cervical or lumbar spinal injury may be compensable; in this case the medical evidence does not support that appellant sustained any impairment of his upper or lower extremities. Therefore, no schedule award can be granted.

CONCLUSION

In this case, the Office met its burden of proof to terminate appellant's wage-loss compensation and medical benefits entitlement based upon the weight of the medical evidence of record which rests with the well-rationalized report of the impartial medical examiner. Further, appellant has not established any entitlement to a schedule award because none of the medical

¹⁵ *Id.*

¹⁶ 20 C.F.R. § 10.404.

¹⁷ *Henry B. Floyd, III*, 52 ECAB 220 (2001).

¹⁸ The Act itself specifically excludes the back from the definition of "organ." 5 U.S.C. § 8101(19).

¹⁹ *See Thomas J. Engelhart*, 50 ECAB 319 (1999).

²⁰ *Id.*

evidence submitted identifies any permanent impairment of a schedule member or of upper or lower extremities due to a spinal condition.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 8, 2004 and October 15, 2003 are affirmed.

Issued: June 10, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member