

**United States Department of Labor
Employees' Compensation Appeals Board**

STEVE A. HORBOL, Appellant)

and)

**DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS ADMINISTRATION MEDICAL)
CENTER, CAMP PENDLETON, San Diego, CA,)
Employer**)

**Docket No. 04-722
Issued: September 3, 2004**

Appearances
Steve A. Horbol, pro se
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On January 21, 2004 appellant filed a timely appeal from an Office of Workers' Compensation Programs' merit decision dated November 12, 2003, which affirmed a June 18, 2003 decision terminating his compensation. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office met its burden to terminate compensation benefits as of December 5, 2001.

FACTUAL HISTORY

On April 16, 2001 appellant, a 46-year-old veterans service representative, injured his lower back while sitting in his chair for a prolonged period. He filed a claim for benefits on

April 27, 2001 which the Office accepted for lumbar strain. The Office commenced payment for temporary total disability compensation.

In order to determine appellant's current condition, the Office referred him for a second opinion examination with Dr. Thomas R. Dorsey, a Board-certified orthopedic surgeon. In a report dated August 17, 2001, he stated that appellant's current condition was not causally related to work factors or his April 2001 work injury, but was due to a right lower extremity radiculopathy based on a natural degenerative process. Dr. Thomas Dorsey advised that a radiculopathy condition such as that experienced by appellant generally resolves within eight months. He opined that appellant could perform an 8 hour job with restrictions of 6 hours of sitting; 6 hours of pulling or pushing not exceeding 10 pounds; 4 hours of standing and walking and reaching; 1 hour of twisting; and no lifting, squatting, kneeling and climbing.

On October 29, 2001 the Office issued a notice of proposed termination. The Office found that Dr. Thomas Dorsey's opinion, finding that appellant was not disabled due to his April 2001 work injury and that he could return to work with restrictions represented the weight of the medical evidence. The Office gave appellant 30 days to submit additional medical evidence or legal argument to contest the proposed termination.

In a report dated November 16, 2001, Dr. Edward H. Bestard, the attending physician and a Board-certified orthopedic physician, stated that appellant experienced severe, constant pain after his April 2001 work injury. Dr. Bestard recommended a magnetic resonance imaging (MRI) scan, which was performed on August 6, 2001. He advised that the MRI scan results showed an L5-S1 disc protrusion of four millimeters and involved the right S1 nerve root. Dr. Bestard also noted some canal stenosis at the L3-4 level and facet degeneration at multiple levels. In addition, appellant underwent an electromyogram (EMG) which showed a motor denervation of the right S1 myotome consistent with an L5 nerve root impingement. Dr. Bestard advised that the April 2001 injury was a new injury; he stated that he had subsequently noted the same symptomatology of low back pain on the right side with right leg pain, numbness and weakness. He concluded that appellant was still temporarily totally disabled due to the April 16, 2001 employment injury.

By decision dated December 5, 2001, the Office terminated appellant's compensation, finding that Dr. Thomas Dorsey's opinion represented the weight of the medical evidence.

By letter dated December 17, 2001, appellant's attorney requested an oral hearing, which was held on March 18, 2003.

In a report dated January 23, 2002, Dr. John B. Dorsey, a Board-certified orthopedic surgeon, diagnosed a lumbosacral spine sprain/strain with herniated nucleus pulposus at L5-S1, in addition to concurrent radiculopathy of the right S1 nerve root as confirmed by MRI scan and EMG. He stated:

"In summary, I am of the opinion that [appellant] sustained an acute rupture of the L5-S1 disc when he bent and twisted his back while sitting at work on April 16, 2001. It is a well-established fact that sitting causes increase stress on the lumbar disc. In fact, forces three and a half times the body weight are projected across the discs when the patient is

in a seated position. If in fact this disc was compromised by a degenerative process, it would be more susceptible to injury and herniation and this appears to be what has occurred in [appellant's] case. [He] is disabled from his employment because of his current back condition.”

By decision dated June 18, 2003, an Office hearing representative affirmed the December 5, 2001 termination decision, finding that the Office met its burden to terminate compensation. The hearing representative found, however, that appellant's submission of Dr. John Dorsey's opinion had created a conflict in the medical evidence regarding whether the April 16, 2001 work injury caused injuries in addition to the accepted lumbar strain and if so, whether appellant still experienced residuals from the April 2001 employment injury. The hearing representative, therefore, remanded the case to the district Office for referral to an impartial specialist to resolve the conflict in the medical evidence. The hearing representative further found that, as the Office met its burden to terminate compensation in the December 5, 2001 decision, appellant was not entitled to reinstatement of compensation pending the issuance of the Office's decision on remand.

On remand the Office referred appellant to Dr. James R. McClurg, a Board-certified orthopedic surgery, for an impartial examination to resolve the conflict.

In a report dated October 6, 2003, Dr. McClurg, after reviewing the medical records and the statement of accepted facts and stating findings on examination, found that appellant's current low back symptomatology was related to preexisting degenerative disc disease with natural progression of the condition and was not caused by the April 16, 2001 employment injury. He stated that appellant was clearly experiencing low back pain, but opined that this was not caused by a twisting injury at work. Dr. McClurg advised that there was no basis to infer that appellant's preexisting condition was asymptomatic until the April 16, 2001 injury. He concluded that there was no need for vocational rehabilitation services due to the April 2001 employment injury.

By decision dated November 12, 2003, the Office found that appellant had no continuing disability or impairment causally related to the April 16, 2001 employment injury, finding that Dr. McClurg's opinion represented the weight of the medical evidence.

LEGAL PRECEDENT

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.¹ 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.²

¹ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

² *Id.*

ANALYSIS

The Office based its decision to terminate appellant's compensation on Dr. Thomas Dorsey's August 17, 2001 report. He stated that a radiculopathy condition such as that experienced by appellant generally resolves within eight months and advised that appellant's current condition was not causally related to work factors or his April 2001 work injury. Dr. Thomas Dorsey believed his condition was attributable to a right lower extremity radiculopathy based on a natural degenerative process. He opined that appellant could perform an 8-hour job and outlined restrictions of 6 hours of sitting; 6 hours of pulling or pushing not exceeding 10 pounds; 4 hours of standing and walking and reaching; 1 hour of twisting; and no lifting squatting, kneeling and climbing. The Office relied on Dr. Thomas Dorsey's opinion in its December 5, 2001 termination decision, finding that appellant had no residuals stemming from his 2001 work injury and that he had no continuing disability for work resulting from the accepted employment injury.

The Board finds that the Office properly found that Dr. Thomas Dorsey's referral opinion negated a causal relationship between appellant's current condition and his April 16, 2001 employment injury. He found that appellant no longer had any residuals from the employment injury. Dr. Thomas Dorsey's report is sufficiently probative, rationalized and based upon a proper factual background. The Office properly accorded greater weight to the opinion of Dr. Thomas Dorsey than to that of Dr. Bestard, the attending physician. The weight of medical opinion is determined by the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts of the case, the medical history provided, the care of analysis manifested and the medical rationale expressed in support of stated conclusions.³ Dr. Bestard related that appellant experienced severe, constant back pain and diagnosed L5-S1 disc protrusion, canal stenosis at L3-4 and facet degeneration at multiple levels based on MRI scan results, in addition to motor denervation of the right S1 myotome consistent with an L5 nerve root impingement based on EMG results. He concluded that appellant was still temporarily totally disabled due to the April 16, 2001 employment injury. However, he did not fully explain how appellant's low back symptomatology and diagnostic findings were causally related to the April 16, 2001 employment injury. Dr. Bestard, therefore, failed to provide a rationalized, probative medical opinion relating appellant's current condition to his April 16, 2001 accepted employment injury. Based on these facts, therefore, the Office properly found that Dr. Thomas Dorsey's opinion constituted the weight of the medical evidence. The Board finds that Dr. Thomas Dorsey's opinion constituted sufficient medical rationale to support the Office's December 5, 2001 decision terminating appellant's compensation.

Once the Office properly terminated appellant's compensation in its December 5, 2001 decision, the burden of proof shifted to appellant to establish a continuing employment-related disability.⁴ He submitted Dr. John Dorsey's January 23, 2002 report. The Office hearing representative, in his June 18, 2003 decision, found that Dr. John Dorsey's report created a conflict in the medical evidence regarding whether the April 16, 2001 work injury caused injuries in addition to the accepted lumbar strain and if so, whether appellant still experienced

³ See *Anna C. Leanza*, 48 ECAB 115 (1996).

⁴ *Talmadge Miller*, 47 ECAB 673, 679 (1996); see also *George Servetas*, 43 ECAB 424 (1992).

residuals from the April 2001 employment injury. The Office subsequently referred the case to Dr. McClurg, the independent medical examiner, who stated that appellant's current low back symptoms were causally related to preexisting degenerative disc disease with natural progression of the condition, not the April 16, 2001 work injury. Dr. McClurg opined that there was no basis to conclude that appellant's preexisting condition was asymptomatic until the April 16, 2001 injury and advised that his low back pain was not caused by a twisting injury at work. The Office relied on Dr. McClurg's opinion in its November 12, 2003 decision, finding that appellant had no continuing disability or impairment causally related to the April 16, 2001 employment injury and was, therefore, not entitled to compensation or medical benefits.

The Board finds that Dr. McClurg's referee opinion negated a causal relationship between appellant's condition and disability and constituted medical evidence sufficient to establish that he no longer had any residuals from his accepted lumbar strain injury employment injuries and that his April 2001 work injury did not cause any additional injuries in addition to the accepted lumbar strain. His opinion is sufficiently probative, rationalized and based upon a proper factual background. Therefore, the Office properly accorded Dr. McClurg's opinion the special weight of an impartial medical examiner.⁵ Accordingly, the Board finds that Dr. McClurg's opinion constituted the weight of medical opinion and supports the Office's November 12, 2003 decision to terminate appellant's compensation and deny any entitlement to continuing disability based on the April 16, 2001 work injury.

CONCLUSION

The Board finds that the Office met its burden to terminate appellant's compensation benefits as of December 5, 2001.

⁵ Gary R. Seiber, 46 ECAB 215 (1994).

ORDER

IT IS HEREBY ORDERED THAT the November 12 and June 18, 2003 decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: September 3, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member