

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EDWARD PETIT and DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION, Palm Springs, CA

*Docket No. 00-1561; Submitted on the Record;
Issued March 7, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective May 24, 1998.

On August 17, 1981 appellant, then a 50-year-old environmental control technician, experienced lower back and upper thigh pains while moving a piece of heavy equipment in the performance of duty. He was first examined by Dr. C.J. Supple on August 19, 1981. An x-ray of the lumbar showed moderately advanced degenerative disc disease with spondylosis at L5. Dr. Supple diagnosed an acute lumbosacral strain and told appellant to stay off work. Appellant subsequently filed a traumatic injury claim that was accepted by the Office for a lumbosacral strain. He returned to light duty with a 10-pound lifting restriction effective August 31, 1981.¹

Although appellant was working light duty he continued to have lower back pain and was referred by Dr. Supple to Dr. Aram Jigarjian, a Board-certified orthopedic surgeon, who obtained authorization from the Office to perform a lumbar myelogram on November 1, 1982, which showed lumbar spinal stenosis at L4-5 and was suspect for a protruded disc at levels L2-3 and L3-4. In a report dated November 9, 1982, Dr. Jigarjian recommended surgery and opined that appellant was disabled from work.

Appellant subsequently began receiving compensation for wage loss on the periodic rolls.

In a report dated September 20, 1983, Dr. Jigarjian advised that appellant had gained a significant amount of weight that was further complicating his lower back pain. He prescribed an exercise program and opined that appellant was unable to return to work.

¹ Appellant was awarded a disability rating by the Department of Veterans Affairs first on December 2, 1970 at 20 percent for cervical degenerative disc disease and 10 percent for degenerative disc disease of the lumbar spine. At the time of his work injury appellant was also receiving treatment for synovitis of the left knee joint.

The Office subsequently referred appellant for vocational rehabilitation and he attempted a two-day per week job as a contract building inspector in August 1984. He reportedly was unable to maintain the job due to continuing back symptoms and was again placed on permanent disability by Dr. Jigarjian. Appellant thereafter underwent physical therapy.

In an OWCP work evaluation form dated March 19, 1985, Dr. Jigarjian opined that appellant had reached maximum medical improvement and was capable of returning to work with a 10-pound lifting restriction.

Appellant underwent arthroscopic surgery for a preexisting left knee condition on July 18, 1985 that hindered rehabilitation efforts to reemploy appellant in a light-duty position.

In a report dated August 18, 1987, Dr. Jigarjian diagnosed spondylogenic low back disease and noted increased lower back symptoms. He therefore opined that appellant was again totally disabled for all work. Dr. Jigarjian continued to complete periodic attending physician reports from 1987 through 1991. He noted physical findings and commented that appellant's back condition was "permanent and stationary."

On January 28, 1993 the Office requested that appellant's treating physician complete a work evaluation form regarding the extent of appellant's disability as causally related to his work injury.

Because Dr. Jigarjian was on medical leave, the form was completed by his partner, Dr. P. Vincent Picchione, a Board-certified orthopedic surgeon, on February 17, 1993, who stated that appellant could work four hours per day with a ten-pound lifting restriction. The record also includes a copy of a report dated October 28, 1992 when appellant was examined by Dr. Picchione. He noted physical findings but did not address the issue of causal relationship.

During 1993, appellant moved from California to North Dakota and was seen by Dr. Michael P. Martire, a Board-certified orthopedist. In a report dated April 28, 1993, Dr. Martire discussed appellant's history of work injury and his symptoms of back pain. He recorded physical findings and diagnosed chronic mechanical low back pain. Dr. Martire stated that appellant would be unable to perform even sedentary work.

In a January 23, 1995 report, Dr. Delano Pfeifle, a Board-certified internist, indicated that appellant continued to have marked neck pain and the same lower back pain.

On February 2, 1995 the Office authorized a change of appellant's treating physician to Dr. Gerard McKenzie, a Board-certified orthopedic surgeon. Although the Office requested that appellant submit a comprehensive medical report from Dr. McKenzie, no such report was forthcoming.

On a prescription form dated March 14, 1995, Dr. McKenzie diagnosed low back pain and prescribed a lumbosacral corset. The record indicates that Dr. McKenzie also referred appellant for physical therapy.

In a December 4, 1997 letter, the Office referred appellant for a second opinion evaluation with Dr. Stephen Dinenberg, a Board-certified orthopedic surgeon, scheduled for

December 19, 1997. He was supplied a copy of medical record and a statement of accepted facts. In his December 19, 1997 report, Dr. Dinenberg noted that on August 17, 1981 appellant had been moving a 200-pound air conditioning unit when he had severe pain in his lower back. Dr. Dinenberg related appellant's medical treatment history and opined that appellant suffered from chronic degenerative disc disease. He opined that appellant did not have any disabling residuals and was no longer disabled as a result of the 1981 work injury. Dr. Dinenberg indicated that appellant's work-related strain due to the work injury had been a temporary aggravation of his preexisting back condition and that it had resolved. He concluded that appellant was totally disabled from work due to chronic, preexisting degenerative disc disease.

On January 14, 1998 the Office issued a notice of proposed termination of compensation advising appellant that the weight of medical opinion evidence, based on Dr. Dinenberg's report, indicated that there was no residual work-related disability and he was not disabled as a result of the accepted condition. Appellant was given 30 days to submit additional evidence or argument if he disagreed with the proposed action.

In letters dated February 12 and 26, 1998, appellant's attorney argued that a conflict existed in the record concerning the extent of appellant's disability and whether or not he had any residuals causally related to his work injury.

In a decision dated May 8, 1998, the Office terminated appellant's compensation effective May 24, 1998.²

On June 4, 1998 appellant requested an oral hearing.

In a decision dated September 8, 1999, an Office hearing representative affirmed the May 8, 1998 decision.

On February 2, 2000 appellant requested reconsideration and submitted a September 2, 1999 report by Dr. Timothy A. Garvey, a Board-certified orthopedic surgeon. Dr. Garvey reported that he saw appellant for chronic low back pain. He opined that appellant's "work-related injury of 1981 is a significant contributing factor to why he [was] having chronic pain symptomology." In a September 2, 1999 treatment note attached to the report, Dr. Garvey indicates that appellant suffers from chronic back pain due to degenerative disc disease at all levels of the lumbar spine, especially L4-5 and L5-S1.

In a February 15, 2000 decision, the Office denied modification.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.³ After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation

² The Office found that there was no conflict in the medical record between Dr. Dinenberg and Dr. Jigarjian, noting that Dr. Jigarjian had not treated appellant since 1992 and he had never properly addressed the role of appellant's preexisting degenerative back condition to his disability.

³ *Harold S. McGough*, 36 ECAB 332 (1984).

without establishing that the disability has ceased or that it was no longer related to the employment.⁴

In this case, the Office accepted that appellant sustained a low back strain on August 17, 1981 in the performance of duty and paid compensation on the periodic rolls for approximately 17 years. The only reasoned and up-to-date medical opinion of record is from Dr. Dinenberg, which states that appellant's work-related strain has resolved by the time of his examination. He further noted that the sprain had caused only a temporary aggravation of appellant's preexisting condition of degenerative disc disease. Based on Dr. Dinenberg's opinion, the Office terminated appellant's compensation effective May 24, 1998.

The Board notes that, while appellant contends that there is a conflict in the medical record, the Office tried without success to obtain a contemporaneous medical opinion from appellant's treating physician, Dr. McKenzie, but he would not provide his opinion as to the extent of appellant's disability due to the accepted work injury.

The Office correctly found that Dr. Jigarjian's opinion was not sufficient to create a conflict with the second opinion physician. The record indicates that Dr. Jigarjian last examined appellant sometime in 1992. Although Dr. Jigarjian opined that appellant was disabled from work, he never discussed whether appellant's continuing disability was due to preexisting degenerative disc disease or the work-related lumbar sprain. Therefore, Dr. Jigarjian's opinion is out-dated and not sufficiently rationalized to create a conflict with the opinion of Dr. Dinenberg.⁵

Similarly, although appellant submitted a September 2, 1999 treatment note from Dr. Garvey, indicating that the "work-related injury of 1981" was a significant contributing factor to his pain symptoms, that statement alone does not create a conflict with Dr. Dinenberg's reasoned medical opinion. Dr. Garvey did not indicate that he was aware of the nature of appellant's work injury and he provided no rationalized explanation as to why appellant continued to have residuals from a low back sprain that occurred over 17 years prior. Dr. Garvey also did specifically offer an opinion as to whether appellant's continuing disability was causally related to his work injury. The Office, therefore, correctly relied on Dr. Dinenberg's opinion in terminating appellant's compensation. Thus, the Board concludes that the Office met its burden of proof in terminating appellant's compensation effective May 24, 1998 on the grounds that the August 21, 1981 work-related strain had resolved and appellant no longer had any disability due to his work injury.

⁴ *Wanda E. Maisonet*, 48 ECAB 212 (1996); *Jason C. Armstrong*, 40 ECAB 907 (1989).

⁵ Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical evidence. See *Elizabeth Stanislav*, 49 ECAB 540 (1998).

The decisions of the Office of Workers' Compensation Programs dated February 15, 2000 and September 8, 1999 are hereby affirmed.

Dated, Washington, DC
March 7, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

David S. Gerson
Alternate Member