

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN C. FOX and DEPARTMENT OF HEALTH & HUMAN SERVICES,
SOCIAL SECURITY ADMINISTRATION, Pottsville, PA

*Docket No. 03-1608; Submitted on the Record;
Issued December 4, 2003*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in finding that appellant had no employment-related disability after January 16, 1998.

The case is on appeal to the Board for the second time.¹ In the first appeal, the Board found that the Office erroneously relied on the opinion of the impartial medical specialist, Dr. Brendan J. O'Brien, an osteopath, in terminating appellant's compensation benefits. The record did not indicate that Dr. O'Brien was a Board-certified medical specialist and, therefore, his opinion could not be accorded the weight of an impartial medical specialist. The Board found that a conflict in the medical evidence continued to exist between appellant's treating physician, Dr. Michael H.O. Dawson, a Board-certified orthopedic surgeon, and the referral physician, Dr. Paul Liebert, a Board-certified orthopedic surgeon, regarding whether appellant's continuing neck problem was due to his employment or his preexisting degenerative disc disease.² The facts of the case are set forth in the Board's prior decision and are hereby incorporated by reference.

On remand, the Office referred appellant to an impartial medical specialist, Dr. Barry A. Silver, a Board-certified orthopedic surgeon. In a report dated May 3, 2002, Dr. Silver considered appellant's history of injury, performed a physical examination, reviewed magnetic resonance imaging scans performed in 1994 and 1997, an electromyogram performed on March 28, 1996 and new x-rays showing a solid fusion at C6 and 7. Dr. Silver stated:

“[Appellant] clearly worked for the [employing establishment] for almost 25 years and then started getting what sounds like typical degenerative symptoms in

¹ Docket No. 00-1022 (issued October 25, 2001). The facts and history surrounding the prior appeal are set forth in the initial decision and are hereby incorporated by reference.

² The Office accepted that appellant sustained an employment-related aggravation of a herniated nucleus pulposus at C5-6 and of degenerative disc disease of the cervical region.

his neck with cervical disc disease and was eventually found to have a herniation or broad-based protrusion at both 5/6 and 6/7. In my opinion, based on the records as I see it, there is absolutely nothing in the history here or in his job description that could cause these degenerative changes or ruptures. These are genetic problems due to degenerative disc disease and eventual posterior protrusion.... There is absolutely nothing in the history that would make me feel that his job aggravated his preexisting condition and there was no trauma in my opinion. This type of situation is not a repetitive use problems and it does not fit into that category.”

Dr. Silver distinguished between an aggravation of an injury and an exacerbation or a “flare.” He stated that “one could use the word ‘flaring’ [sic] to indicate that occasionally diseases of this kind are exacerbated, which means flares, like a diabetic would flare.” He stated that there was “nothing to indicate [that] this is something that he aggravated from working.” Dr. Silver stated:

“To continue, the patient apparently did have some successful palliation of his problem from the cervical surgery done in 1994 and then continued to degenerate in the year or two after that and eventually went out of work. I will state again that there is nothing in the history that would tell me that the patient had an aggravation of his relatively successful surgery from his job but, unfortunately, he continued to deteriorate as is the normal problem with cervical disc disease. I will point out that Dr. Dawson even in his letter also used the word “exacerbation” of degenerative disc disease and that is in my opinion the proper terminology. An exacerbation is not an aggravation or a traumatic situation but a flare of a degenerative condition such again as diabetes and is not in my opinion related to work in any way.”

Dr. Silver opined that appellant was capable of working and the only reason he could not work would be due to his chronic degenerative problem in his neck. He stated that appellant could perform sedentary work subject to sitting, pushing, pulling and lifting restrictions.

By decision dated June 4, 2002, the Office terminated benefits, finding that the opinion of Dr. Silver, the impartial medical specialist, constituted the weight of the evidence and established that appellant did not have any disability after January 16, 1998.

By letter dated June 26, 2002, appellant requested an oral hearing before an Office hearing representative, which was held on January 22, 2003. At the hearing, appellant stated that Drs. Dawson and O’Brien believed that his return to work would aggravate his condition. Appellant stated that Dr. Dawson restricted him from frequent movement of the neck and the shoulders and gave him restrictions on lifting, kneeling and crawling. He indicated that Dr. O’Brien restricted him from strenuous or repetitive duties involving the neck and upper extremities and noted that Dr. Silver based his report on the erroneous assumption that his job was not repetitive. Appellant stated that Dr. Silver misconstrued the statement of facts by distinguishing between the words aggravation and exacerbation. He indicated that he felt that his aggravation was permanent and his benefits should be reinstated as of January 1998.

Appellant noted that he had not worked since May 1996 and that he was currently on disability retirement. Appellant stated that he did not believe, that there was any work he could do. Appellant explained that he felt a lot of pressure on the back of his neck and had headaches. He stated that to relieve the pain, he would try to walk a half hour, then sit in a chair and lie down. Appellant stated that his job involved a lot of neck motion because he would look up and down at the computer screen and keyboard. Appellant submitted reports from the Occupational Health and Safety Administration and the National Institute of Occupational Safety and Health, advising of the health hazards of repetitive work on the computer and listed synopses of Board cases he felt were relevant to his claim. Appellant also submitted an x-ray report dated March 15, 2002, which showed moderate mixed degenerative arthritic changes of the cervical spine especially prevalent involving C5, 6 and 7 with spondylosis at those levels.

By decision dated March 20, 2003, the Office hearing representative affirmed the Office's June 4, 2002 decision.

The Board finds that the Office met its burden of proof in terminating benefits after January 16, 1998.

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits. 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 The Office's burden of proof includes the necessity of furnishing rationalized medical evidence based on a proper factual and medical background.⁴

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.⁵ If, however, the opinion from the specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist, for the purpose of correcting a defect in the original report.⁶

To resolve the conflict in the medical evidence between appellant's treating physician, Dr. Dawson and the referral physician, Dr. Liebert, regarding whether appellant's neck condition was work related, the Office referred appellant to the impartial medical specialist, Dr. Silver. In his May 3, 2002 report, Dr. Silver opined that appellant's work activities would not cause his degenerative changes or ruptures. He stated that these were genetic problems due to degenerative disc disease and eventual posterior protrusion. Dr. Silver stated that there was no trauma on appellant's job and his condition did not fit into a repetitive use problem. He stated that appellant had some successful palliation of his problem from the cervical surgery done

³ *Wallace B. Page*, 46 ECAB 227, 229-30 (1994); *Jason C. Armstrong*, 40 ECAB 907, 916 (1989).

⁴ *Larry Warner*, 43 ECAB 1027, 1032 (1992); *see Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁵ *Kathryn Haggerty*, 45 ECAB 383, 389 (1994).

⁶ *Roger W. Griffith*, 51 ECAB 491, 505 (2000); *Harry T. Mosier*, 49 ECAB 688, 693 (1998).

in 1994, but that his condition continued to degenerate in the following year or two and eventually he stopped work. Dr. Silver stated that appellant's work history did not show that his job aggravated his condition after the surgery but that appellant's condition continued to deteriorate from his nonwork-related cervical disc disease. Dr. Silver's opinion is based on a review of appellant's history, physical examination and diagnostic tests. His opinion is well rationalized and, as the impartial medical specialist, his opinion constitutes the weight of the evidence. The Office met its burden of proof to terminate benefits.

The March 20, 2003 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
December 4, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member