

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARK ZYSK and U.S. POSTAL SERVICE,
POST OFFICE, Detroit, Mich.

*Docket No. 96-1693; Submitted on the Record;
Issued July 1, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits effective November 15, 1995; and (2) whether the Branch of Hearings and Review properly denied appellant's request for an oral hearing.

The Board has duly reviewed the record on appeal and finds that the Office failed to meet its burden to terminate appellant's compensation benefits effective November 15, 1995.

Appellant filed a claim on April 5, 1995 alleging he injured his neck and shoulder in the performance of duty. The Office accepted appellant's claim for neck strain and subluxation at C5. Appellant alleged a recurrence of disability on May 31, 1995. By decision dated November 15, 1995, the Office denied appellant's claim finding no residuals of the April 5, 1995 employment injury. However, the Office noted that it had approved appellant's claim for recurrence of disability on May 31, 1995. Appellant requested reconsideration on November 25, 1995. By decision dated February 28 1996, the Office modified its November 15, 1995 decision finding that chiropractic services and travel related thereto until November 15, 1995 were compensable, that the May 31, 1995 recurrence of disability was accepted as causally related to appellant's employment injury and that the only accepted condition due to the April 5, 1995 employment injury was neck strain¹ which had resolved by November 15, 1995. Appellant requested an oral hearing on March 7, 1996 and by decision dated April 9, 1996 the Branch of Hearings and Review denied appellant's request on the grounds that he had previously requested reconsideration and that the issue in his case could be addressed through the reconsideration process.

¹ The Board notes that the Office did not meet its burden of proof to rescind acceptance of subluxation at C5. *Alice M. Roberts*, 42 ECAB 747, 753-54 (1991).

In this case, appellant initially selected Dr. Henry J. Cousineau, a chiropractor, as his attending physician. Dr. Cousineau submitted several reports diagnosing subluxations of the spine. He indicated that he had examined x-rays.

The Office referred appellant to Dr. Norman L. Pollak, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated October 13, 1995, Dr. Pollak found that the x-rays of appellant's cervical spine appeared entirely normal and that there was no evidence of subluxation at C5. He further stated that appellant had recovered from his accepted employment injuries and that appellant did not require further treatment or work restrictions.

In a report dated December 18, 1995, Dr. Cousineau noted appellant's complaints of pain and diagnosed subluxation of C5 vertebra with associated inflamed connective tissue, radiculitis, hypolordosis, cervicalgia; subluxation of T3 vertebra with associated inflamed connective tissue, myospasm, scoliosis, thoracic pain; subluxation of L5 vertebra with associated myospasm, hypolordosis, lumbar region pain. He opined that appellant's conditions were a direct result of his work-related injury. Dr. Cousineau indicated that appellant could perform light duty.

The Board finds that there is a conflict of medical opinion evidence between appellant's attending physician, Dr. Cousineau, who found that appellant continued to experience residuals and disability from his accepted employment injury and Dr. Pollack, the Office referral physician, who found that appellant had no disability and no medical residuals causally related to his April 5, 1995 employment injury. Section 8123(a) of the Federal Employees' Compensation Act,² provides, "If there is 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." As there is an unresolved conflict of medical opinion in the case, the Office failed to meet its burden of proof to terminate appellant's compensation benefits.³

² 5 U.S.C. §§ 8101-8193, 8123(a).

³ Due to the disposition of the issue of termination of disability, it is not necessary to reach the issue of whether the Branch of Hearings and Review abused its discretion by denying appellant's request for an oral hearing.

The decision of the Office of Workers' Compensation Programs dated February 28, 1996 is reversed.

Dated, Washington, D.C.
July 1, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member