

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALFIO J. FRULLANI and DEPARTMENT OF VETERANS AFFAIRS,
MEDICAL CENTER, Erie, Pa.

*Docket No. 97-287; Submitted on the Record;
Issued November 16, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation on the grounds that his accepted emotional condition had resolved.

In this case, the Office accepted depression as causally related to appellant's federal employment, and he began receiving compensation for temporary total disability. The Office determined that a conflict in the medical evidence existed as to whether appellant had a continuing employment-related disability, and the case was referred to Dr. Donald J. Coleman, a Board-certified psychiatrist.

In a decision dated March 25, 1996, the Office terminated appellant's compensation on the grounds that the evidence established that residuals of his employment-related condition had ceased. By decision dated August 6, 1996, the Office reviewed the case on its merits and denied modification of the prior decision.

The Board has reviewed the record and finds that the Office met its burden of proof in terminating compensation in this case.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.¹

In this case, the Office found that a conflict existed between the attending psychiatrist, Dr. John W. Barteaux, and the second opinion referral psychiatrist, Dr. Rudolph E.M. Janosko. Dr. Barteaux had continued to indicate that appellant's condition was employment related, while

¹ *Patricia A. Keller*, 45 ECAB 278 (1993).

Dr. Janosko provided a September 19, 1994 report opining that appellant was not disabled from a psychiatric viewpoint. Section 8123(a) of the Federal Employees' Compensation Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.² To resolve the conflict, the Office sought the opinion of Dr. Coleman, who provided a report dated January 7, 1995. Dr. Coleman provided a history and results on examination, finding that appellant had suffered a mild dysthymic reaction which was diagnosed and treated. Dr. Coleman concluded that currently there were no signs of depression, and no disability for work.

It is well established that when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.³ In this case, Dr. Coleman provided a thorough report in which he found that appellant had no continuing disability causally related to the accepted condition. The Board finds that his opinion is entitled to special weight. It is noted that appellant subsequently submitted reports from Dr. Barteaux dated November 1, 1994 and July 15, 1996. The July 15, 1996 report states that appellant has been receiving care for major depression, anxiety disorder and traumatic stress disorder, "all relating to his experiences at work," without providing further explanation. Since Dr. Barteaux was on one side of the conflict created under 5 U.S.C. § 8123(a), his subsequent reports which are essentially repetitive of his prior reports are insufficient to overcome the special weight given to Dr. Coleman.⁴ The Board finds that the weight of the medical evidence established that the employment-related disability had ceased, and accordingly the Office has met its burden of proof in terminating compensation for wage loss.⁵

The Board notes that the March 25, 1996 Office decision also terminated medical benefits, and the Office again has the burden of proof to establish that the termination was proper.⁶ In this case, the referral physician, Dr. Janosko, did appear to indicate in his September 19, 1994 report that there were some continuing employment-related residuals, although the effects of the work environment "no longer seem present to a significant degree" and were not disabling. There was, therefore, no conflict under 5 U.S.C. § 8123(a) on this issue. When Dr. Coleman examined appellant on January 2, 1995; however, he found no evidence of a continuing depression. In the absence of a contemporaneous narrative report from Dr. Barteaux

² *Robert W. Blaine*, 42 ECAB 474 (1991); 5 U.S.C. § 8123(a).

³ *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

⁴ *See Josephine L. Bass*, 43 ECAB 929 (1992).

⁵ The Board notes that there is no indication that appellant received a pretermination notice prior to the March 25, 1996 termination decision. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.6(a) (March 1997). The Board has held, however, that such procedural errors may be addressed by the existence of meaningful post-deprivation processes. *Lan Thi Do*, 46 ECAB 366 (1994). In this case, appellant requested reconsideration and submitted additional evidence which was considered by the Office and reviewed by the Board. This constituted an adequate post-deprivation remedy for the procedural error in this case.

⁶ *Furman G. Peake*, 41 ECAB 361 (1990).

or other reasoned medical evidence that appellant continued to have residuals of the accepted condition, the Board finds that Dr. Coleman's report represented the weight of the evidence and the Office met its burden in terminating medical benefits.

The decisions of the Office of Workers' Compensation Programs dated August 6 and March 25, 1996 are affirmed.

Dated, Washington, D.C.
November 16, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member