

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL A. DE SANTIS and U.S. POSTAL SERVICE,
POST OFFICE, Providence, R.I.

*Docket No. 97-657; Submitted on the Record;
Issued January 7, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation and medical benefits effective December 10, 1995.

On December 16, 1982 appellant, then a 28-year-old city carrier, filed a notice of traumatic injury and claim, alleging that on December 15, 1982, he injured his back while in the performance of duty. Appellant returned to work on December 29, 1982, but on January 6, 1983 he filed a claim for recurrence of disability. On March 1, 1983 the Office accepted both claims for contusion of the left shoulder and low back with musculoskeletal sprain. On August 3, 1983 appellant returned to regular-duty work. On October 8, 1985 appellant filed a second notice of traumatic injury and claim for injuries he sustained while in the performance of duty when a wooden staircase collapsed while he was delivering mail. Appellant stopped work on that date and returned to work on October 16, 1985. On October 28, 1985 appellant filed a claim for recurrence of disability beginning October 24, 1985. These claims were accepted for a fracture of the back at level D8. Subsequently, the Office accepted that appellant sustained a lumbosacral strain and a contusion that were also causally related. On March 14, 1989 appellant returned to limited-duty work for four hours a day. In a letter dated October 12, 1995, the Office notified appellant that it proposed termination of his benefits on the grounds that he had no residuals of his employment injuries. By decision dated November 20, 1995, the Office terminated appellant's compensation and medical benefits effective December 10, 1995. In a decision dated September 4, 1996, an Office hearing representative affirmed the November 20, 1995 decision of the Office.

The Board has duly reviewed the entire case record on appeal and finds that the Office improperly terminated appellant's compensation and medical benefits effective December 10, 1995.¹

Under the Federal Employees' Compensation Act,² once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of compensation.³ After the Office determines that an employee has a disability causally related to his or her employment, the Office may not terminate compensation without establishing that its original determination was erroneous or that the disability has ceased or is no longer related to the employment injury.⁴

The fact that the Office accepts appellant's claim for a specified period of disability does not shift the burden of proof to appellant to show that he or she is still disabled. The burden is on the Office to demonstrate an absence of employment-related disability in the period subsequent to the date when compensation is terminated or modified.⁵ Therefore, the Office must establish that appellant's condition was no longer aggravated by employment factors after December 10, 1996, and the Office's burden includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁶

In the present case, the Office determined that appellant had no residuals of his accepted employment injuries based on the August 7, 1995 report by Dr. Roger Pocze, a Board-certified orthopedic surgeon and Office referral physician. Dr. Pocze reviewed appellant's medical record and the statement of accepted facts and found that appellant had chronic pain localized lower than his history of vertebrae fracture and that there was no objective evidence to support his prolonged history of subjective complaints. He believed there was some evidence of symptom magnification which equaled chronic pain syndrome but that there were no abnormal findings to support his pain and the minimal disc bulging demonstrated by magnetic resonance imaging (MRI) scan was unlikely to be of significance. Dr. Pocze indicated that appellant was capable of the activities described for the position of city mail carrier in the statement of accepted facts "but that carrying 35 pounds 6 hours a day and intermittently bending would be very likely to produce subject complaints. Lifting up to 70 pounds from the floor to the waist would also be very likely to induce significant increases in his complaints and would not appear to be advisable." On the work capacity evaluation form, Dr. Pocze found that he could not estimate the amount of weight

¹ The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. As appellant filed his appeal with the Board on November 29, 1996, the only decision before the Board is the Office's September 4, 1996 decision. *See* 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

² 5 U.S.C. § 8101 *et seq.*(1974).

³ *William Kandel*, 43 ECAB 1011 (1992).

⁴ *Carl D. Johnson*, 46 ECAB 804 (1995).

⁵ *Dawn Sweazey*, 44 ECAB 824 (1993).

⁶ *Mary Lou Barragy*, 46 ECAB 781 (1995).

appellant could lift from the floor or how frequently he could perform such a task. He indicated that a functional capacity examination should be administered to provide this information.

A review of the record indicates that the statement of accepted facts was inaccurate and that, therefore, the questions posed to Dr. Pocze were incomplete. The claims examiner indicated that appellant's October 8, 1995 claim was accepted for lumbosacral strain and contusion without also noting that the Office accepted that appellant fractured his back at level D8. The claims examiner then requested information on whether appellant had any residuals of "his work-related lumbosacral strain and contusion sustained on October 8, 1995." The claims examiner is responsible for ensuring that the statement of accepted facts is correct, complete, unequivocal and specific. When a second opinion specialist renders a medical opinion based on an incomplete or inaccurate statement of accepted facts, the probative value of the opinion is seriously diminished or negated altogether.⁷ While Dr. Pocze extracted a history from appellant and his medical records that noted that he had sustained a fracture of his back in his October 1995 employment injury, the physician did not specifically address whether appellant had any residuals of that injury or whether he would be able to perform his date-of-injury job in light of that accepted employment injury. In addition, Dr. Pocze provided reservations on appellant's ability to perform three of the functions of his date-of-injury employment and with respect to the requirement for lifting 70 pounds indicated that appellant's performance of this task was not advisable and that he could not provide an estimate without a functional capacity examination which was not administered. Thus, Dr. Pocze's report is not sufficient to establish that appellant did not have any residuals of his accepted employment injuries because it was based on an inaccurate statement of accepted facts, the Office did not request a complete opinion with respect to all of appellant's accepted injuries and the physician expressed reservations concerning appellant's capacity to perform all of the requirements of his date-of-injury job.⁸ The Office has not met its burden of proof in terminating appellant's compensation effective December 10, 1995.

⁷ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990).

⁸ The Board notes that appellant submitted substantial conflicting medical evidence from his treating physician, Dr. David J. Santo, a Board-certified neurosurgeon, that appellant was partially disabled due to his accepted employment injuries. This evidence included numerous medical reports submitted before the termination of benefits and a deposition that was taken after the November 20, 1995 decision.

The decision of the Office of Workers' Compensation Programs dated September 4, 1996 is hereby reversed.

Dated, Washington, D.C.
January 7, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member