

U. S. DEPARTMENT OF LABOR
Employees' Compensation Appeals Board

In the Matter of ALBERT CASCONÉ and U.S. POSTAL SERVICE,
POST OFFICE, Plainview, NY

*Docket No. 98-591; Submitted on the Record;
Issued April 5, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation effective May 31, 1996.

In the present case, the Office accepted that appellant sustained a right knee sprain in the performance of duty on March 11, 1993. Appellant returned to light duty on April 20, 1993. He underwent right knee surgery on February 3, 1994. Dr. Anthony Puglisi, an orthopedic surgeon, provided a postoperative diagnosis of torn lateral meniscus, loose body of the medial aspect and synovitis. Appellant returned to light duty on March 15, 1994 and to full duty on May 31, 1994. On April 24, 1995 appellant again underwent right knee surgery and stopped working. He returned to work on August 7, 1995 at four hours per day, based on the restrictions imposed by Dr. Puglisi.

The Office referred appellant to Dr. John C. Killian, an orthopedic surgeon, for evaluation. Dr. Killian provided a report dated December 21, 1995 and completed a work capacity evaluation (Form OWCP-5c). According to the Office, a conflict was created with Dr. Puglisi, and appellant was referred to Dr. David J. Weissberg, a Board-certified orthopedic surgeon.

In a letter dated April 30, 1996, the Office advised that it proposed to terminate his compensation based on the weight of the medical evidence. By decision dated May 31, 1996, the Office terminated appellant's compensation for wage loss and medical benefits. By decision dated September 12, 1997, the Office denied modification of the prior decision.

The Board has reviewed the record and finds that the Office did not meet its burden of proof to terminate 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

Although the Office found a conflict in the medical evidence under 5 U.S.C § 8123(a)² between Drs. Killian and Puglisi, the Board finds that the evidence from Dr. Killian was not sufficient to create a conflict. In his December 21, 1995 report, he noted mild swelling in the knee and complaints of diffuse tenderness, a mild limp and difficulty squatting. Dr. Killian stated, “based on these findings, I would conclude that this claimant has a moderate permanent partial disability. It is clear that his impairment is due to a chronic inflammatory disorder which was not caused by the March 11, 1993 injury. It is much more likely that it is due to his Reiters syndrome or another inflammatory condition. There may have been an aggravation as a result of the March 11, 1993 injury.”³ Dr. Killian does not explain whether any employment-related aggravation had ceased. On the work capacity evaluation, he responded to a question as to which work limitations were due to the employment injury by stating, “all partially.” Based on this response it would appear that Dr. Killian attributed appellant’s continuing condition at least in part to the employment injury. Moreover, his statement as to disability was that appellant “is capable of working for eight hours a day at a more sedentary capacity [than his date of injury job].” He does not specifically address whether appellant was capable of working eight hours in the light-duty job he had been performing, and it is not clear from the record whether the restrictions he recommended were within the duties of the light-duty job. The Office did not request a supplemental report from Dr. Killian to clarify his opinion as to appellant’s employment-related disability. The Board finds that the reports of Dr. Killian are not of sufficient probative value on the relevant issues to create a conflict with the attending physician under 5 U.S.C. § 8123.

The referral to Dr. Weissberg is therefore as a second opinion referral physician.⁴ In a report dated March 12, 1996, Dr. Weissberg stated that he “cannot find objective evidence to support why this patient is having so much pain at this time.” He opined that appellant did not require further treatment for the right knee and could work full time without restrictions. On the other hand, Dr. Puglisi submitted a May 10, 1996 report, in which he discussed in detail appellant’s medical history and his opinion that appellant continued to have an employment-related disability. The Board finds that there was a conflict in the medical evidence at the time of the Office’s termination of compensation in this case. Since it is the Office’s burden of proof to terminate, the Board finds they did not meet their burden in this case.

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

² 5 U.S.C. § 8123(a) 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.

³ The Board notes that the record indicates that appellant was hospitalized on March 20, 1993 with a preliminary diagnosis of Reiters syndrome, a reactive arthritis condition. The record contains, however, a report dated June 29, 1995 from Dr. Kenneth Solinsky, a rheumatologist, opining that the diagnosis of Reiters syndrome was unlikely, given the lack of further attacks of iritis or other symptoms associated with this condition.

⁴ *See John H. Taylor*, 40 ECAB 1228 (1989).

The decision of the Office of Workers' Compensation Programs dated September 12, 1997 is reversed.

Dated, Washington, D.C.
April 5, 2000

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member