

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TIMOTHY J. KEATING and U.S. POSTAL SERVICE,
POST OFFICE, Wilkes-Barre, PA

*Docket No. 02-275; Submitted on the Record;
Issued September 18, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation.

The case has been on appeal previously.¹ In a February 15, 2000 decision, the Board noted that appellant was injured on June 15, 1993 when his postal vehicle was struck from behind in a car accident. The Office accepted appellant's claim for cervical and lumbosacral strain. The Office subsequently terminated appellant's compensation on the grounds that he had no continuing disability due to the employment injury. The Board, however, found that the Office had failed to meet its burden of proof in terminating compensation. The Board stated that, while the Office had found a conflict in the medical evidence, the record failed to support that a conflict in the medical evidence existed when the Office referred appellant to Dr. David R. Cooper, a Board-certified orthopedic surgeon. The Board found that Dr. Cooper's report created an unresolved conflict in the medical evidence. The Board therefore reversed the Office's termination of appellant's compensation.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Abdol H. Samii, a Board-certified neurologist, for an examination and opinion on whether appellant was disabled due to his employment injury. In a June 6, 2000 report, Dr. Samii stated that appellant had subjective chronic neck, shoulder and low back with no abnormal neurological findings to support radiculopathy. He noted that appellant was status post laser discectomy at L4-5 and L5-S1. Dr. Samii diagnosed preexisting degenerative arthritis of the cervical and lumbar regions of the spine. He noted that a magnetic resonance imaging (MRI) scan showed degenerative discs at C4-5 and C6-7 with mild impingement upon the anterior aspect of the thecal sac. The MRI scan also showed a broad-based central herniated disc at L5-S1 with minimal impingement upon the thecal sac and first degree L5-S1 anterolisthesis. Dr. Samii stated that the diagnosis of mild cervical and low back sprain was related to the

¹ Docket No. 98-1063 (issued February 15, 2000).

June 15, 1993 employment injury. He indicated that appellant's multiple subjective complaints did not correspond to his neurological findings. Dr. Samii commented that appellant should resume full activities. He concluded that the residuals from appellant's employment injury had ceased. Dr. Samii stated that the findings on the MRI scans were not related to appellant's employment injury as he had a negative myelogram in 1995.

In a July 18, 2000 letter, the Office informed appellant that it proposed to terminate his compensation on the basis of Dr. Samii's report. In an August 3, 2000 letter, appellant's attorney stated that Dr. Samii had been previously associated with appellant. He submitted a March 5, 1992 report in which Dr. Samii indicated that an electromyogram (EMG) and nerve conduction studies of appellant's right leg were normal with no evidence of radiculopathy or entrapment neuropathy.

In an August 15, 2000 memorandum to the file, a senior Office claims examiner stated that the report showed Dr. Samii prepared the report one-year prior to the employment injury for an unrelated condition. She noted that this examination was eight years prior to the impartial medical examination of appellant. The Office claims examiner stated that there was no evidence that Dr. Samii recognized appellant or that appellant remembered Dr. Samii until he reported the prior examination in August 2000. She commented that the prior report did not indicate whether Dr. Samii ever saw appellant or just interpreted the EMG results. The Office claims examiner added that, as appellant did not live in an area with an overabundance of physicians, it would be unreasonable to expect that there would never be some contact between appellant and a physician. She concluded that there was no evidence of bias in Dr. Samii's report.

In an August 23, 2000 report, Dr. Joseph R. Trubia, a Board-certified orthopedic surgeon, reviewed appellant's medical records and indicated that appellant was injured in December 29, 1999 automobile accident, sustaining soft tissue injuries in the neck and low back regions. Dr. Trubia indicated that he assumed any complaints appellant had about his neck and back were related to the June 15, 1993 employment injury. He noted that an MRI scan taken January 10, 2000 showed no change from a 1993 cervical MRI scan. Dr. Trubia concluded that appellant's cervical C6-7 fusion was not related to the recent accident but could be related to the 1993 work-related incident which caused his permanent disability. He stated that appellant incurred an exacerbation of his prior debilitating injuries of his neck and low back which caused permanent disability prior to the 1999 accident.

In a November 6, 2000 decision, the Office terminated appellant's compensation on the grounds that the evidence of record failed to show any residuals from appellant's employment injury.

Appellant requested a hearing before an Office hearing representative which was subsequently converted into a review of the written record. In a December 4, 2001 decision, the Office hearing representative found that Dr. Samii was properly selected as an impartial medical specialist because his only action regarding appellant involved interpreting test data prior to the employment injury. He stated that Dr. Samii's impartiality was not undermined because he had not provided an opinion that was used to create a conflict in the medical opinion in a case and had not previously provided an opinion concerning the 1993 employment injury. Dr. Samii

concluded that his report constituted the weight of the medical evidence and showed that appellant's disability from the employment injury had ceased.

The Board finds that the Office improperly terminated compensation.

The Board has held that the physician serving as the impartial medical specialist should be one who is wholly free to make a completely independent evaluation and judgment, untrammelled by a conclusion rendered on a prior occasion.² The record shows that Dr. Samii had examined appellant on a prior occasion, before the occurrence of the employment injury. The Office hearing representative found that, since Dr. Samii had not examined appellant or given an opinion in relation to the employment injury, he met the test as set by the Board. The Board, however, has held to a stricter definition. The impartial specialist must be a physician who has not examined appellant previously for any condition. Any prior examination may affect the opinion of an impartial medical specialist depending on the circumstances of the examination, including whether a claimant had complained about the manner in which the prior examination was conducted or whether the physician was appropriately compensated for the prior examination. The Board cannot allow the opinion of the impartial medical specialist to potentially be influenced by factors unrelated to the issue that the impartial medical specialist is asked to address. Under these circumstances, Dr. Samii cannot be considered to be an appropriate impartial specialist in this case.

The decision of the Office of Workers' Compensation Programs dated December 5, 2001 is reversed.

Dated, Washington, DC
September 18, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

² *Raymond E. Heathcock*, 32 ECAB 2004 (1981); *Beverly Wetzel (Wayne C. Wetzel)*, 26 ECAB 181 (1974); *Paul J. Rini*, 13 ECAB 557 (1962).