

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of BLAINE W. BOTKIN and U.S. POSTAL SERVICE,  
DALLAS BULK MAIL CENTER, Dallas, Tex.

*Docket No. 97-1325; Submitted on the Record;  
Issued September 23, 1998*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,  
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective September 18, 1994 on the grounds that he had no residual medical condition or disability causally related to his accepted employment injuries of subluxation of the cervical, thoracic and lumbar spine and fibromyalgia; and (2) whether appellant met his burden of proof in establishing that he had an employment-related disability which continued after termination of compensation benefits.

This is the second appeal in this case to the Board. The Board's decision and order of June 29, 1989 set forth the relevant facts and circumstances of the case and is hereby incorporated by reference.<sup>1</sup> In that prior decision, the Board reversed the Office's finding that any disability due to his accepted employment injuries had ceased effective August 3, 1986. On remand, the Office reinstated appellant's compensation benefits for temporary total disability. On April 15, 1990 appellant began participation in the Office rehabilitation program. On March 28, 1994 the Office proposed termination of appellant's compensation on the grounds that any disability due to his accepted employment injury had ceased. After further development of the evidence, in a letter dated August 8, 1994, the Office notified appellant that it proposed termination of his compensation on the grounds that he had no disability or medical condition causally related to his accepted employment injuries. In a decision dated September 12, 1994, appellant's compensation was terminated effective September 18, 1994. In merit decisions dated November 29, 1995 and December 2, 1996, the Office denied appellant's requests for reconsideration on the grounds that the evidence submitted was not sufficient to warrant modification.

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<sup>1</sup> Docket No. 89-125 (issued June 29, 1989).

The Board has carefully reviewed the entire case record in this appeal and finds that the Office properly terminated appellant's compensation effective September 18, 1994.<sup>2</sup>

Under the Federal Employees' Compensation Act,<sup>3</sup> once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of compensation.<sup>4</sup> 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.<sup>5</sup>

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.<sup>6</sup> Therefore, the Office must establish that appellant's condition was no longer aggravated by employment factors after September 18, 1994, and the Office's burden includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>7</sup>

In the present case, the Office terminated appellant's compensation based on the medical reports of Dr. Britt Daniel, a Board-certified neurologist and Office referral physician, and Leonard R. Carney, a Board-certified neurologist and impartial medical examiner. In a report dated January 14, 1994, Dr. Daniel found his neurological examination of appellant to be normal and diagnosed a history compatible with depression and a tension state or "psychopathophysiologic" disorder with muscle contraction symptoms. He did not believe that appellant's current symptoms were related to the "trivial injury that happened in March of 1985." Dr. Daniel concluded that appellant did not have what he thought fibromyalgia was but did have more chronic back pain and that appellant could work eight hours a day in a light-duty type appointment.

In a report dated July 8, 1994, Dr. Carney found that there were no objective findings of a current cervical, thoracic or lumbar subluxation, lumbar strain or fibromyalgia and further found no medical disability connected to the work injury of March 4, 1985 which prevented appellant from returning to his date-of-injury position. Dr. Carney also indicated that Dr. Radie F. Perry, a previous Office referral physician, had recommended a standard battery of studies to rule out

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<sup>2</sup> 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 February 28, 1997, the only decision before the Board is the Office's December 2, 1996 decision. See 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

<sup>4</sup> *William Kandel*, 43 ECAB 1011 (1992).

<sup>5</sup> *Carl D. Johnson*, 46 ECAB 804 (1995).

<sup>6</sup> *Dawn Sweazey*, 44 ECAB 824 (1993).

<sup>7</sup> *Mary Lou Barragy*, 46 ECAB 781 (1995).

spondyloarthropathy or rheumatoid disease which had not been performed. In this regard, Dr. Carney has criticized all of the previous reports in which a physician had diagnosed fibromyalgia as Dr. Carney has indicated that these tests are necessary to provide an objective basis for such a diagnosis. Dr. Carney's explanation that this battery of tests is necessary to formulate an objective basis for a proper diagnosis of fibromyalgia provides a rationalized explanation for his conclusion that appellant does not have objective evidence of fibromyalgia or any other medical disability causally related to his March 4, 1994 employment injury. In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of the resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>8</sup> The Board has carefully reviewed the opinion of Dr. Carney and finds that it has sufficient probative value, regarding the relevant issue in the present case, to be accorded such special weight. The Office met its burden of proof in terminating appellant compensation effective September 18, 1994.

However, the Board further finds that the issue of whether appellant has met his burden of proof in establishing that he had employment-related disability which continued after the termination of his compensation benefits is not in posture for decision.

After it has been established that termination or modification of compensation benefits is clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant.<sup>9</sup> In order to prevail, appellant must establish by the weight of the reliable probative and substantial evidence that he or she had an employment-related disability which continued after termination of compensation benefits.<sup>10</sup>

Subsequent to the Office's proper termination of compensation, appellant requested reconsideration and submitted medical evidence supportive of his contention that he had residual disability from the accepted condition of fibromyalgia. In a report dated December 15, 1994, Dr. David M. Buhner, a Board-certified internist with a subspecialty in rheumatology indicated that appellant met the 1990 criteria for fibromyalgia as defined by the American College of Rheumatology. He reported that appellant's fibromyalgia had an onset with his employment injury, was of the post-traumatic variety, and was too severe to allow appellant to return to his previous employment which was very physically demanding. This well-reasoned and rationalized report by Dr. Buhner is sufficient to create a conflict in the medical evidence. Section 8123(a) of the Act<sup>11</sup> states that 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. Thus, as there is an unresolved conflict in the medical evidence between the opinions of Drs. Carney and Buhner, the case will be remanded to the Office for resolution of that conflict and such further development as it

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<sup>8</sup> *Jack R. Smith*, 41 ECAB 691 (1990); *James P. Roberts*, 31 ECAB 1010 (1980).

<sup>9</sup> *Gary R. Sieber*, 46 ECAB 215 (1994).

<sup>10</sup> *Id.*; see also *Wentworth M. Murray*, 7 ECAB 572 (1955).

<sup>11</sup> 5 U.S.C. § 8123(a).

deems necessary to be followed by a *de novo* decision on the issue of whether appellant has met his burden of proof in establishing residual employment-related disability after the termination of his compensation.

The decision of the Office of Workers' Compensation Programs dated December 2, 1996 is affirmed in part and set aside in part, and the case is remanded for further proceedings in accordance with this decision.

Dated, Washington, D.C.  
September 23, 1998

George E. Rivers  
Member

David S. Gerson  
Member

Michael E. Groom  
Alternate Member