

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DAVID K. ASKINS and U.S. POSTAL SERVICE,  
POST OFFICE, Topeka, Kans.

*Docket No. 97-2486; Submitted on the Record;  
Issued June 18, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden to terminate appellant's compensation.

On November 30, 1994 appellant, then a 51-year-old letter carrier, filed a notice of traumatic injury, alleging that he injured his lower spine on that same date when he lifted a mail tray in the course of his federal employment. On December 27, 1994 the Office accepted the claim for a lumbosacral sprain. Appellant filed a previous notice of traumatic injury on July 7, 1993 indicating that on that same date he slipped and injured the left side of his back in the course of his federal employment. The Office also accepted this claim for a lumbosacral sprain. The Office combined appellant's claims on March 24, 1995.

On January 5 and February 2, 1995 Dr. Michael Schmidt, appellant's treating physician and a Board-certified orthopedic surgeon, recommended permanent work restrictions.

On April 24, 1996 the Office referred appellant, along with a statement of accepted facts, to Dr. Satish Bansal, a Board-certified orthopedic surgeon, for a second opinion examination.

On May 1, 1996 Dr. Bansal reviewed the history of appellant's accepted injuries, which occurred on July 7, 1993 and November 30, 1994. He also noted that prior to 1970 appellant sustained an injury in his lower back involving multiple fractures of the transverse process in his lumbar spine. He indicated that appellant underwent a lumbar fusion as a result of this injury. Dr. Bansal noted that appellant currently experienced pain in the lumbar area that had started to go upwards towards the thoracic spine. He recorded complaints of pain in both legs. He reviewed appellant's work history and noted that appellant had been on light duty since late 1994 or early 1995. Upon examination, Dr. Bansal noted that upper extremity abduction of the shoulder caused a pulling sensation in appellant's lower back. He noted that the thoracic spine revealed no deformity. Dr. Bansal stated that rotation of the thoracic spine towards the left was up to 45 degrees and rotation of the right was up to 70 degrees. He stated that this rotation

produced pain in the lumbar area. Dr. Bansal noted a loss of lumbar lordosis. He found no muscle spasm in the lumbar area. Dr. Bansal indicated that flexion and extension of the lumbar spine was painful. He stated that extension of the hips produced pain in the lumbar spine. Dr. Bansal's x-rays revealed no increase of spondylolisthesis of L5-S1. He stated that disc space narrowing at L5-S1 was the same and that bone spurs in the middle of the lumbar spine were bigger than on previous x-rays. He stated that appellant's fusion remained satisfactory. Dr. Bansal diagnosed a degenerative upper and midlumbar spine and previously fused L3-4, L4-5 and L5-S1 with total and partial laminectomy at two levels and resulting spondylolithesis from original trauma. He stated that this condition was unrelated to the work injuries appellant sustained on July 7, 1993 and November 30, 1994. Dr. Bansal stated that appellant had no residuals from his accepted injuries because they were muscular-type injuries. He indicated that appellant's continued disability stemmed from his unrelated 1970 lumbar fusion.

On May 2, 1995 Dr. Schmidt treated appellant for low back pain. He noted mild right-sided lumbar spasm and stated that appellant had reached maximum medical recovery. He opined that appellant had a 16 percent whole body impairment due to his back.

On August 26, 1996 the Office issued a "Notice of Proposed Termination of Compensation." The Office indicated that the medical evidence established that appellant had recovered from the effects of his work injuries of July 7, 1993 and November 30, 1994 and that any medical disability resulted from a nonwork-related medical condition. Appellant was given 30 days to submit additional evidence or argument.

On September 24, 1996 appellant's representative objected to the proposed termination of benefits. In support, he submitted a deposition of Dr. Bansal provided in an unrelated case.

By decision dated September 27, 1996, the Office terminated benefits on the basis that the medical evidence demonstrated that appellant's work-related conditions had resolved.

On October 11, 1996 appellant requested reconsideration. In support, appellant submitted an October 4, 1996 report from Dr. Schmidt who noted that appellant continued to suffer from low back pain. He diagnosed chronic, mechanical low back pain secondary to Grade I spondylolithesis of L5 on S1. Dr. Schmidt also diagnosed a previous fusion from previous bilateral posterolateral fusion from L4-S1 and associated work-related trauma. He again noted a 16 percent whole body permanent impairment. Dr. Schmidt stated that a portion of appellant's disability was due to a preexisting condition and that were it not for that condition, appellant would have no disability. He opined that 70 percent of the disability was related to his preexisting condition and that 30 percent was due to the work-related injury which altered appellant's functional status and flexibility.

By decision dated February 13, 1997, the Office denied appellant's request for review because the evidence submitted in its support was immaterial and insufficient to warrant review of the prior decision.

On March 18, 1997 appellant requested reconsideration. In support, appellant submitted a October 5, 1994 report from Dr. John D. Ebeling, a neurological surgeon. Dr. Ebeling reviewed appellant's history and conducted an examination. His x-rays revealed an L5

laminectomy and a L4 hemilaminectomy. Dr. Ebeling noted a bilateral fusion at L4-5 and pseudoarthritis at L5 to S1 bilaterally. He found a Grade 1 spondylothesis at L5-S1 and a vacuum disc. Dr. Ebeling bone scan showed some increased uptake at the L5 level bilaterally and unilaterally at the L4 level. He noted radicular symptoms and findings consistent with L5 on the right.

Appellant also submitted an October 8, 1996 report, from Dr. Schmidt in which he again diagnosed a previous fusion from previous bilateral posterolateral fusion from L4-S1 and associated work-related trauma. He again noted a 16 percent whole body permanent impairment. Dr. Schmidt stated that a portion of appellant's disability was due to a preexisting condition and that were it not for that condition, appellant would have no disability. He opined that 70 percent of the disability was related to his preexisting condition and that 30 percent was due to the work-related injury which altered appellant's functional status and flexibility.

Finally, appellant submitted an October 11, 1996 report, from Dr. Ron Huffman, a diagnostic radiologist, which revealed an abnormal range of motion in appellant's lumbar spine. Dr. Huffman opined that appellant was unable to perform his previous duties as a city letter carrier.

By decision dated April 23, 1997, the Office denied modification because the additional new and relevant evidence was insufficient to establish residuals of his previous work-related conditions.

The Board, however, finds that the Office did not meet its burden of proof due to an unresolved conflict in medical opinion.

Once the Office has accepted a claim and pays compensation, it has the burden of proof of justifying termination or modification of benefits. After it has determined that an employee has disability causally related to his federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>1</sup>

In the present case, the Office relied on the opinion of Dr. Bansal, a Board-certified orthopedic surgeon, to terminate benefits. Dr. Bansal opined that appellant's work-related injuries sustained in 1993 and 1994 had resolved because they were muscular-type injuries. He explained that appellant's continued complaints stemmed solely from his lumbar fusion surgery performed in 1970. Dr. Bansal's opinion, however, was contradicted by appellant's treating physician, Dr. Schmidt, a Board-certified orthopedic surgeon, who opined in his reports that appellant remained partially disabled from his accepted employment injuries. Dr. Schmidt based his opinion on his numerous examinations of appellant and he explained that appellant's functional status and flexibility were affected by his accepted injuries which impacted on his present condition. Dr. Schmidt attributed 30 percent of appellant's disability to his work-related injuries. The opinions of Drs. Bansal and Schmidt are both well rationalized and supported by their physical findings on examination. As there are opposing medical reports of virtually equal

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<sup>1</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989).

weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Federal Employees' Compensation Act,<sup>2</sup> to resolve the conflict in the medical opinion.

The decision of the Office of Workers' Compensation Programs dated April 23, 1997 is hereby reversed.

Dated, Washington, D.C.  
June 18, 1999

Michael J. Walsh  
Chairman

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member

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<sup>2</sup> 5 U.S.C. § 8123(a); *see Martha A. Whitson (Joe D. Whitson)*, 36 ECAB 370 (1984).