

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of STEPHEN A. RUTKOWSKI and U.S. POSTAL SERVICE,
POST OFFICE, Pitman, NJ

*Docket No. 01-130; Submitted on the Record;
Issued December 14, 2001*

DECISION and ORDER

Before DAVID S. GERSON, 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 benefits.

On October 31, 1997 appellant, then a 40-year-old letter carrier, sustained a cervical and thoracic sprain and herniated disc at C6-7 in the performance of duty when he struck his head on his vehicle's doorframe. He returned to work in a limited-duty capacity on November 24, 1997.

By letter dated February 2, 1999, the Office advised appellant that he had been placed on the periodic compensation rolls effective January 5, 1999 to receive compensation for temporary total disability.

In a report dated March 22, 1999, Dr. Eric I. Mitchell, appellant's attending orthopedic surgeon, provided findings on examination indicated that appellant was totally disabled.

In a report dated April 2, 1999, Dr. Mitchell stated that appellant had a herniated disc as revealed by a myelogram and computerized tomography (CT) scan and was totally disabled.

In a report dated June 7, 1999, Dr. Mitchell stated that appellant could perform light-duty work for four hours a day.

In a report dated June 24, 1999, Dr. Marc L. Kahn, a Board-certified orthopedic surgeon and an Office referral physician, provided a history of appellant's condition and findings on examination and stated that there were no objective findings supporting continued disability. He stated that appellant could return to work without restrictions.

Due to the conflict in the medical opinion evidence between Drs. Mitchell and Kahn as to whether appellant continued to be disabled due to his October 31, 1997 employment injury, the Office referred appellant to Dr. Stanley R. Askin, a Board-certified orthopedic surgeon and impartial medical specialist, for an examination and evaluation in order to resolve the conflict.

In a report dated August 24, 1999, Dr. Askin provided a history of appellant's condition, findings on examination, the results of tests and stated that appellant had no objective findings to support any residual disability causally related to his October 31, 1997 employment injury. He stated:

"There are no objective findings that demonstrate residue of [appellant's] work injury. His condition of cervical spondylosis is the equivalent of having a rusty hinge in his neck. If he moves the rusty hinge in a particular fashion, it will be symptomatic and if he does not it wo[uld] n[o]t be. There is nothing present which is a residue of the injury nor is there anything present which cries out for surgical attention.

"[Appellant] examines without spasticity nor neuromuscular dysfunction. That does not mean that he does not have neck discomfort but that such discomfort as he may have, is merely a consequence of his time of life and nothing more.

"I do not consider that there is any ongoing disability referable to the occurrence of October 31, 1997. The rationale regarding such is that those of his chosen health care providers (those he sought out) who feel that he has a guarded prognosis or who feel that he needs surgery, have overlooked the fact that [appellant] examines no differently than any other person of middle age. Degenerative changes appropriate to his age are being medicalized beyond recognition.

"[Appellant] has no disability medically related to the work incident of October 31, 1997. There is no work induced reason why [appellant] could not resume full-time employment without restriction."

* * *

"[Appellant] has achieved maximum medical improvement. Basically, he does not have a condition which would profit from further interaction with health care providers. It is my considered opinion that he is much more likely to be injured by medical attention than be improved by it."

* * *

"In summary, [appellant] describes having had some painful event in October 1997 and an exacerbation of such in late 1998. Such is certainly in keeping with what commonly happens to people who are middle aged or older and does not mean that surgery is either appropriate nor advisable for him."

Dr. Askin noted in his report that he had worked as a letter carrier himself at one time and thus had some familiarity with the nature of the exertion and tasks required.

By letter dated November 5, 1999, the Office advised appellant that it proposed to terminate his compensation benefits on the grounds that the weight of the medical evidence, as represented by the August 24, 1999 report of Dr. Askin, established that appellant had no continuing disability causally related to his October 31, 1997 employment injury.

By decision dated December 7, 1999, the Office terminated appellant's compensation effective January 2, 2000.

By letter dated December 20, 1999, appellant requested an oral hearing which was held on May 25, 2000.

In a report dated June 2, 2000, Dr. Mitchell provided findings on examination and diagnosed degenerative disc disease of the cervical spine, loss of cervical lordosis and a herniated disc at C6-7 with impingement of the left anterior spinal cord. He stated his opinion that appellant could perform light-duty work for four hours a day and opined that appellant's condition was causally related to his October 31, 1997 employment injury.

By decision dated July 18, 2000 and finalized July 20, 2000, the Office hearing representative affirmed the Office's December 7, 1999 decision.

The Board finds that the Office met its burden of proof in terminating appellant's compensation.

It is well established that 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 is no longer related to the employment.¹

In a report dated March 22, 1999, Dr. Mitchell, appellant's attending orthopedic surgeon, provided findings on examination indicated that appellant was totally disabled. In a report dated April 2, 1999, he stated that appellant had a herniated disc as revealed by a myelogram and CT scan and was totally disabled. In a report dated June 7, 1999, Dr. Mitchell stated that appellant could perform light-duty work for four hours a day.

In a report dated June 24, 1999, Dr. Kahn, a Board-certified orthopedic surgeon and an Office referral physician, provided a history of appellant's condition and findings on examination and stated that there were no objective findings supporting continued disability. He stated that appellant could return to work without restrictions.

Due to the conflict in the medical opinion evidence between Drs. Mitchell and Kahn as to whether appellant continued to be disabled due to his October 31, 1997 employment injury, the Office properly referred appellant to Dr. Askin for an examination and evaluation in order to resolve the conflict.²

¹ See *Alfonso G. Montoya*, 44 ECAB 193, 198 (1992); *Gail D. Painton*, 41 ECAB 492, 498 (1990).

² Section 8123(a) of the Federal Employees' Compensation Act provides, in pertinent part: "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." 5 U.S.C. § 8123(a); see *James P. Roberts*, 31 ECAB 1010 (1980).

Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.³

In his August 24, 1999 report, Dr. Askin provided a history of appellant's condition, findings on examination and the results of tests and stated that there were no objective findings to demonstrate that appellant had any residual medical condition or disability causally related to the October 31, 1997 employment injury. He stated that any discomfort he experienced was a result of the normal aging process. Dr. Askin stated that appellant required no further medical treatment and could resume full-time work without restrictions. The August 24, 1999 report of Dr. Askin is sufficiently well rationalized and based on a proper factual and medical background and is therefore entitled to special weight. It establishes that appellant had no continuing disability causally related to his October 31, 1997 employment injury.

In a report dated June 2, 2000, Dr. Mitchell provided findings on examination and diagnosed degenerative disc disease of the cervical spine, loss of cervical lordosis and a herniated disc at C6-7 with impingement of the left anterior spinal cord. He stated his opinion that appellant could perform light-duty work for four hours a day and opined that appellant's condition was causally related to his October 31, 1997 employment injury. However, this report lacks objective findings and sufficient medical rationale to support continuing disability as a result of the October 31, 1997 employment injury. Further, as Dr. Mitchell was on one side of the conflict of medical opinion which was referred to Dr. Askin as the impartial medical specialist, his subsequent report is insufficient to outweigh or create a new conflict with Dr. Askin's opinion.⁴

The decisions of the Office of Workers' Compensation Programs dated July 20, 2000 and December 7, 1999 are affirmed.

Dated, Washington, DC
December 14, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

³ See *Juanita H. Christoph*, 40 ECAB 354, 360 (1988); *Nathaniel Milton*, 37 ECAB 712, 723-24 (1986).

⁴ See *Dorothy Sidwell*, 41 ECAB 857, 874 (1990).