

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT C. RABE and DEPARTMENT OF AGRICULTURE,
FSIS, MPI, WESTERN REGION, Alameda, Calif.

*Docket No. 96-163; Submitted on the Record;
Issued April 23, 1998*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits; and (2) whether the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion.

The Board has duly reviewed the case record and concludes that the Office did not meet its burden of proof in terminating appellant's compensation benefits.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation. After it has determined that an employee has disability causally related to his or her employment, the Office may not terminate compensation without establishing that the disability has ceased or that it was no longer related to the employment.¹

In the present case, the Office accepted that appellant, a veterinary medical officer, sustained an employment-related L5-S1 disc prolapse and probable left S1 radiculopathy on May 31, 1984. Appellant stopped work on June 1, 1984 and was placed on the periodic roll effective December 23, 1984. He has not returned to work.

On September 29, 1993 the Office referred appellant, along with a statement of accepted facts, the medical record and a set of questions, to Dr. Ron Brockman, an osteopathic orthopedist. In an October 14, 1993 report, Dr. Brockman advised that appellant was experiencing "only minimal residuals" from the 1984 employment injury, with left buttock and leg pain and persistent decrease in sensation over the lateral border of the left foot. He also advised that there was no longer any left calf atrophy and concluded that appellant could perform the duties of veterinary medical officer.

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

By letter dated May 25, 1994, the Office informed appellant that it proposed to terminate his compensation and by decision dated July 5, 1994, terminated appellant's wage-loss compensation on the grounds that the weight of the medical evidence, as evidenced by the opinion of Dr. Brockman, established that his work-related disability had ceased. Following appellant's request, a hearing was held on February 28, 1995, at which time appellant submitted additional medical evidence.

In an August 16, 1991 report, Dr. Malcolm B. Madenwald, a Board-certified orthopedic surgeon, who had treated appellant since his injury, advised that appellant's condition was fixed and stable and he that could not return to his previous employment. In reports dated August 10, 1994 and February 2, 1995, he noted that appellant had persistent one centimeter atrophy of the left calf, weakness to plantar flexion and absent left ankle jerk. Dr. Madenwald advised that his assessment "remains the same as previously" and his previous recommendation "stands." Appellant also submitted a February 22, 1995 review of an August 27, 1994 magnetic resonance imaging of the lumbosacral spine that demonstrated mild bulging of L3-4 and L4-5 and moderate bulging at L5-S1.

By decision dated May 4 and finalized May 5, 1995, an Office hearing representative affirmed the prior decision, finding that the weight of the medical evidence rested with the opinion of Dr. Brockman. On July 6, 1995 appellant requested reconsideration. By decision dated July 31, 1995, the Office denied appellant's request on the grounds that he neither raised a substantive legal question nor submitted relevant evidence. The instant appeal follows.

The Board finds that a conflict exists between the opinions of the Office physician, Dr. Brockman, an osteopathic orthopedist and appellant's treating physician, Dr. Madenwald, a Board-certified orthopedic surgeon. While Dr. Brockman opined that appellant could perform the duties of a veterinary medical officer, Dr. Madenwald, who had treated appellant from the time of his employment injury, was consistent in his opinion that appellant continued to be disabled therefrom. Furthermore, the two physicians disagreed as to whether appellant had left calf atrophy. When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial specialist, pursuant to section 8123(a) of the Federal Employees' Compensation Act,² to resolve the conflict in the medical opinion. Consequently, the Office did not meet its burden of proof in terminating appellant's compensation. On remand the Office shall refer appellant to an impartial medical specialist to resolve the conflict in the medical opinion evidence as to whether appellant's disability has ceased.³

² 5 U.S.C. § 8123(a).

³ In light of the Board's disposition of the first issue in this case, the second issue need not be reached.

The decisions of the Office of Workers' Compensation Programs dated July 31 and May 5, 1995 are hereby reversed.

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

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member