

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANDERSON L. CLARK and U.S. POSTAL SERVICE,
POST OFFICE, St. Petersburg, Fla.

*Docket No. 98-75; Submitted on the Record;
Issued April 1, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation effective June 22, 1997.

On September 7, 1989 appellant, then a 43-year-old clerk, filed an occupational disease claim, alleging that he sustained lower back pain and lower left lumbar and hip pain causally related to factors of his federal employment. Appellant stopped work on September 7, 1989. He returned to work and worked intermittently until February 2, 1990 when he stopped work. The Office accepted appellant's claim for low back strain. Appellant retired on medical disability October 2, 1990. On May 9, 1997 the Office proposed termination on the grounds that the medical evidence by Dr. Victor J. Bilotta, a Board-certified orthopedic surgeon and Office referral physician, indicated that appellant had no continuing disability as a result of his accepted injury. By decision dated June 11, 1997, the Office terminated appellant's compensation effective June 22, 1997 on the grounds that any disability due to his September 7, 1989 employment injury had ceased. In a merit decision dated September 11, 1997, the Office denied appellant's request for reconsideration on the grounds that evidence submitted was insufficient to establish modification of the Office's prior decision.

The Board finds that the Office has not met its burden of proof in terminating appellant's compensation effective June 22, 1997.

Under the Federal Employees' Compensation Act,¹ once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of compensation.² 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

¹ 5 U.S.C. § 8101 *et seq.* (1974).

² *William Kandel*, 43 ECAB 1011 (1992).

determination was erroneous or that the disability has ceased or is no longer related to the employment injury.³

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.⁴ Therefore, the Office must establish that appellant's condition was no longer aggravated by employment factors after June 22, 1997 and the Office's burden includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵

In the present case, the Office referred appellant to Dr. Bilotta after Dr. James L. West, a Board-certified orthopedic surgeon and appellant's treating physician, did not respond to its February 6, 1996 request for an updated work restriction form. On June 29, 1996 appellant was referred to Dr. Bilotta for a second opinion examination. In a report dated July 29, 1996, Dr. Bilotta noted some range of motion problems on examination and indicated that the majority of appellant's problems were due to his preexisting condition of a shortened lower extremity due to an open fracture of his tibia. However, he also opined that appellant had some occasional mild back problems, secondary to his workers' compensation injury although he was not totally disabled from them. Dr. Bilotta concluded that appellant could return to work but indicated that appellant's previous job required frequent bending and stooping which appellant could not do. He indicated that appellant had permanent restrictions of lifting no more than 30 pounds, standing and walking 8 hours a day, sitting 4 to 6 hours a day, and occasional bending, stooping, squatting and twisting. Dr. Bilotta found that appellant had reached maximum medical improvement and had a five percent permanent impairment. Since Dr. Bilotta had not clearly responded to the Office's question concerning whether appellant was capable of performing his preinjury position of mail processor, the Office requested a follow-up report. In a report dated October 14, 1996, Dr. Bilotta noted the results from appellant's computerized tomography and magnetic resonance imaging scans. He concluded that appellant was employable with restrictions and that if the mail processor job fell within these restrictions, appellant was capable of doing that work. In letters dated January 31, February 7, and April 28, 1997, the Office again requested information from Dr. Bilotta concerning whether based on his physical examination of appellant, a review of appellant's records and a review of a videotape provided by postal inspectors of appellant engaged in various physical activities over a two-year period of investigation, appellant was capable of performing his date-of-injury job as a mail processor. In a letter dated April 8, 1997, Dr. Bilotta responded to the Office's requests and indicated that he had reviewed the videotape and appellant would be able to work as a mail processor without difficulty. The April 8, 1997 report on which the Office based its termination is not sufficient to meet its burden of proof as this report is not rationalized, especially in light of the contrasting opinions he had expressed in earlier reports based on his physical examination of appellant.

³ *Carl D. Johnson*, 46 ECAB 804 (1995).

⁴ *Dawn Sweazey*, 44 ECAB 824 (1993).

⁵ *Mary Lou Barragy*, 46 ECAB 781 (1995).

Dr. Bilotta has not explained what aspects of appellant's behavior in the videotape led to his conclusion that appellant was capable of performing his date-of-injury job without the permanent restrictions delineated in his July 1996 report. Moreover, in his October 1996 report and February 7, 1997 letters, Dr. Bilotta is unclear about the physical requirements of the mail processor position since he asked the Office whether this position fell within the parameters of his previously listed restrictions. Since the April 8, 1997 report is a marked change from Dr. Bilotta's prior reports and letters, he would need to thoroughly explain the basis for his changed conclusions in providing a well-reasoned and rationalized medical opinion. As Dr. Bilotta's report does not provide any explanation for his conclusion that appellant is capable of performing his date-of-injury employment, it is not sufficient to discharge the Office's burden of proof.⁶ The Office has not met its burden of proof in terminating appellant's compensation effective June 22, 1997.

The decisions of the Office of Workers' Compensation Programs dated September 11 and June 11, 1997 are hereby reversed.

Dated, Washington, D.C.
April 1, 1998

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member

⁶ It is noted that subsequent to the issuance of the Office's decision terminating benefits, appellant filed a request for reconsideration and submitted a medical report dated May 23, 1997 by Dr. Clark. While this report also does not fully explain the basis for the physician's conclusion that appellant continued to be totally disabled and does not clearly relate that total disability to appellant's accepted employment injury, this report is substantially equal to Dr. Bilotta's April 8, 1997 report. Therefore, there is an unresolved conflict in the medical evidence that arose subsequent to the issuance of the Office's June 11, 1997 decision.