

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLES F. JOHNSON, III and DEPARTMENT OF AGRICULTURE,
WALNUT GRANGE SERVICE CENTER, Beltsville, Md.

*Docket No. 97-2047; Oral Argument Held September 1, 1998;
Issued December 8, 1998*

Appearances: *Richard J. Link, Esq.*, for appellant; *Miriam D. Ozur, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation effective November 9, 1996.

In the present case, appellant filed a claim alleging that he sustained an emotional condition causally related to his federal employment. The Office determined that an incident in which a supervisor's memorandum notes that a vendor had referred to appellant as a "flaming queer" was a compensable factor of employment, and the claim was accepted for major depressive disorder. Appellant stopped working on June 17, 1994 and began receiving compensation for temporary total disability.

By letter dated September 18, 1996, the Office advised appellant that it proposed to terminate his compensation on the grounds that his continuing disability was not causally related to his federal employment. The Office indicated that the weight of the evidence rested with Dr. Brian Schulman, a psychiatrist, selected as a second opinion referral physician. Appellant then submitted an October 7, 1996 report from the attending psychiatrist, Dr. Elizabeth A. Lilly.

In a decision dated October 18, 1996, the Office terminated appellant's compensation effective November 9, 1996.

Appellant requested reconsideration, and by decision dated February 4, 1997, the Office reviewed the case on its merits and denied modification of its prior decision. By decision dated May 14, 1997, the Office found that appellant's February 12, 1997 request for reconsideration was insufficient to require merit review of the prior decisions.

The Board finds that there is a conflict in the medical evidence and therefore the Office failed to meet its burden in terminating compensation.

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 was no longer related to the employment.¹

In the present case, the Office determined that the weight of the evidence was represented by the referral physician, Dr. Schulman, who submitted a September 5, 1996 report. Dr. Schulman provided a history and results on examination, and he found that appellant was disabled from working at the employing establishment. He noted the incident accepted as a factor of employment, and opined "I do not accept this as a precipitant to his present condition." The Board notes that the Office based its acceptance of the claim on the initial reports of Dr. Lilly. These reports conflict with the report of Dr. Schuman, who rejected the term "flaming queer" as being a precipitant to appellant's current condition. In addition the attending psychiatrist, Dr. Lilly, provided an October 7, 1996 report, noting in pertinent part that appellant's "ongoing disability has been caused by the memo[redacted] in which he was referred to as a 'flaming queer.'" In the October 18, 1996 decision, the Office found this statement to be "incorrect," and therefore presumably of diminished probative value. The Board finds, however, that there is no evidence that Dr. Lilly's report was based on an incorrect history of the accepted incident. The record contains a September 2, 1992 memorandum from a supervisor, who specifically quotes a statement alleged to have been made by a vendor to one of appellant's coworkers. Dr. Lilly does not assert that the supervisor made the statement or otherwise misinterpreted the accepted factor of employment.

The Board therefore finds that there was an unresolved conflict in the medical evidence as to whether appellant continued to have an employment-related disability. Since it is the Office's burden to terminate compensation, it has failed to meet its burden in this case.

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

The decisions of the Office of Workers' Compensation Programs dated May 14 and February 4, 1997, and October 18, 1996 are reversed.

Dated, Washington, D.C.
December 8, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member