

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EDWARD HUNT and DEPARTMENT OF THE NAVY,
NAVAL SEA SYSTEMS COMMAND, Philadelphia, Pa.

*Docket No. 95-2263; Submitted on the Record;
Issued February 2, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

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

The Board has duly reviewed the case record and finds that the Office did not meet its burden of proof in this case.

In the present case, the Office has accepted that appellant, an electrician, sustained a lumbar strain, right hip contusion and lumbar radiculopathy as a result of a fall on February 15, 1989. Following the injury, appellant returned to light work on February 21, 1989, but stopped work on July 7, 1989 and did not return. The Office paid appellant appropriate compensation benefits. The Office terminated appellant's compensation benefits by decision dated February 16, 1994 on the grounds that the weight of the medical evidence established that appellant's disability, resulting from the injury of February 15, 1989, ceased by, and no later than, March 5, 1994. Following a hearing before an Office hearing representative, the termination of appellant's compensation was affirmed by decision dated April 19, 1995.

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

The Office terminated appellant's compensation benefits based upon a report received from Dr. Seymour Shlomchik, a Board-certified orthopedic surgeon, an Office second opinion physician. In his report dated December 2, 1993, Dr. Schlomchik related appellant's history of injury and medical treatment and noted appellant's physical examination findings.

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

Dr. Schlomchik stated that while radiographic studies evidenced degenerative disc disease, appellant's electromyographic studies did not indicate an acute neurological problem. Dr. Schlomchik concluded that based upon appellant's history and physical examination, it was his impression that appellant had nothing objectively wrong with the lumbar spine and that while he had a number of other medical problems including asbestosis, prostate, gout and obesity, if one considered only his back complaints, there was no reason why he could not function at full capacity.

Appellant's treating physicians, Dr. Corey K. Ruth, an orthopedic surgeon and Dr. Sriniva A-Bhumi submitted medical reports to the record which indicated that appellant's accepted diagnosis had not ceased. Dr. Ruth submitted reports to the Office during 1993 and 1994 at intervals of approximately one month in which he stated diagnoses of post-traumatic lumbosacral strain and sprain with left S1 lumbar radiculitis based upon examinations of appellant's lumbar spine which indicated lumbar tenderness and restriction of lumbar motion and mild weakness of the left leg. In a report dated April 26, 1993, regarding appellant's back condition, Dr. A-Bhumi noted appellant's examination findings and related that appellant had chronic lumbosacral and sacroiliac sprain and strain, lumbar radiculopathy. Dr. A-Bhumi concluded that appellant continued to be symptomatic in the lumbosacral region and because of the unresolved pain appellant continued to be dysfunctional and was disabled.

Section 8123(a) of the Federal Employees' Compensation Act² provides that if there is a 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.³

In the present case, an Office referral physician, Dr. Shlomchik opined that appellant did not have residuals of the accepted employment injury, but rather had findings consistent with degenerative disc disease. Appellant's attending physicians, Drs. Ruth and A-Bhumi, however, continued to assert that appellant's accepted conditions of lumbar strain and lumbar radiculopathy contributed to cause total disability. Thus, a conflict exists in the medical evidence as to whether the accepted conditions ceased or whether the accepted conditions continued to disable appellant. It is, as noted above, the Office's burden of proof to terminate compensation in this case. The Office cannot meet its burden of proof until the conflict in the medical evidence is properly resolved. As the Office has not resolved the conflict in the medical evidence, it has failed to meet its burden and the termination of compensation was improper.

² 5 U.S.C. § 8123(a).

³ See *Dallas E. Mopps*, 44 ECAB 454 (1993).

The decision of the Office of Workers' Compensation Programs dated April 19, 1995 is hereby reversed.

Dated, Washington, D.C.
February 2, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member