

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DUANE G. VERNES and U.S. POSTAL SERVICE,
POST OFFICE, St. Paul, MN

*Docket No. 97-2686; Submitted on the Record;
Issued December 10, 1999*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly rescinded its acceptance of a herniated disc at the L3-4 level.

On September 4, 1985 appellant sustained an injury while in the performance of his duties when he bent over to pick up letters from the floor and developed back pain. The Office initially approved his claim for herniated lumbar disc at the L3-4 level and subsequently approved the claim for laminectomy performed in 1987, aggravation of degenerative disc disease and lumbosacral strain.

In a decision dated November 22, 1995, the Office rescinded its acceptance of the herniated disc, finding that the weight of the medical evidence established that no herniation existed.

In a decision dated July 15, 1996, an Office hearing representative affirmed the Office's decision on the issue of rescission of the herniated disc. The Office denied modification of this decision on January 30 and June 11, 1997. Appellant thereafter filed an appeal with the Board on July 25, 1997.

The Board finds that the Office properly rescinded its acceptance of a herniated disc at the L3-4 level.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits. This holds true where, as here, the Office later decides that it erroneously accepted the claim. To justify rescinding its acceptance of a claim, the Office must show that it based its rescission on new evidence, legal argument or rationale.¹

The new evidence in this case is the August 15, 1995 report of Dr. David D. Mellencamp, the Board-certified orthopedic surgeon and impartial medical specialist selected to resolve

¹ *Katherine A. Kirtos*, 42 ECAB 160 (1990).

conflicts in medical opinion. Dr. Mellencamp reviewed the medical evidence of record and correctly observed that a consulting radiologist had interpreted the computerized axial tomography (CAT) scan performed on October 22, 1985 as showing a “contained” lateral disc herniation at L3-4. Appellant’s attending physician thereafter reported that appellant had a “lumbar disc herniation at L3,” and the diagnosis was carried forward since that time. Appellant’s attending surgeon, Dr. Shelley N. Chou, reported that appellant underwent myelography and was noted to have a bulging lateral disc at the L3-4 level on the left side. In his postoperative report of March 10, 1987, Dr. Chou stated that he explored the L3-4 interspace to look at the nerve root on the left side. A hemilaminectomy was performed at L3-4, as well as a laminectomy and foraminotomy for the L4 nerve root. His postoperative diagnosis noted a “bulging disc at L3-4 of the L4 nerve root.” Dr. Mellencamp reported that magnetic resonance imaging (MRI) scans from early 1987 to late 1990 failed to significantly substantiate the diagnosis of herniated disc at L3-4, which was basically ruled out by Dr. Chou’s surgical procedure in 1987.

Dr. Mellencamp concluded that there was no herniated disc at L3-4. His report explains how the diagnosis of herniated lumbar disc evolved from the original diagnosis of contained lateral disc herniation. Dr. Mellencamp’s review of the diagnostic testing performed in this case establishes that appellant had a bulging disc at L3-4, not a herniated disc. Because his opinion is well reasoned and is based on an accurate medical background, the Board finds that it carries sufficient probative value to justify the Office’s decision to rescind its acceptance of a herniated lumbar disc at L3-4. The Board will therefore affirm the Office’s July 15, 1996 decision on the issue of rescission.

The June 11 and January 30, 1997 decisions of the Office of Workers’ Compensation Programs are affirmed on the issue of rescission.

Dated, Washington, D.C.
December 10, 1999

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member