

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of EUGENE SIMMONS and U.S. POSTAL SERVICE,  
POST OFFICE, CANAL STREET STATION, New York, NY

*Docket No. 98-408; Submitted on the Record;  
Issued December 2, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective August 20, 1996.

The Board has duly reviewed the case on appeal and finds that the Office did not meet its burden to terminate 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.<sup>1</sup>

In the present case, the Office accepted that appellant, then a 42-year-old letter carrier, sustained an employment-related herniated disc at L4-5, for which he received appropriate compensation for intermittent wage loss. Following further development, on December 5, 1995 the Office referred him, along with the medical record, a statement of accepted facts and a set of questions, to Dr. Burton Diamond, a Board-certified neurologist, for a second-opinion evaluation. Based on Dr. Diamond's reports, by letter dated July 9, 1996, the Office proposed to terminate appellant's compensation benefits. By letter dated August 5, 1996, appellant objected to the proposed termination and, by decision dated August 20, 1996, the Office terminated his compensation, effective that day, finding that the weight of the medical evidence rested with the opinion of Dr. Diamond. Appellant requested a hearing that was held on February 26, 1997 and submitted additional medical evidence to the Office. By decision dated April 25, 1997, an Office hearing representative affirmed the prior decision. Appellant requested reconsideration and submitted additional medical evidence. In an October 17, 1997 decision, the Office denied appellant's request. The instant appeal follows.

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<sup>1</sup> See Patricia A. Keller, 45 ECAB 278 (1993).

The relevant medical evidence includes numerous form reports from appellant's treating family practitioner, Dr. Isaiah H. Pinckney who consistently advised that appellant was disabled. In a November 2, 1995 report, Dr. Pinckney provided a history that appellant fell at work on February 2, 1993 and diagnosed cervical radiculopathy and herniated disc at L4-5. He advised that appellant's condition was "clearly related" to the fall and that he could work with the restrictions provided in an attached work restriction evaluation. In a January 16, 1996 report, the Office referral physician, Dr. Diamond, diagnosed chronic lumbar sprain with no distinct radicular symptomatology and concluded that appellant had no neurological disability related to his lower back and needed no further treatment for this condition.

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,<sup>2</sup> to resolve the conflict in the medical opinion.<sup>3</sup> In this case, appellant's treating physician, Dr. Pinckney repeatedly opined that appellant continued to be partially disabled due to his employment-related back condition. However, the Office referral physician, Dr. Diamond, offered an opinion that appellant had no disability related to his lower back. The Board finds that the reports of Drs. Pinckney and Diamond are of approximately equal value and are in conflict on the issue of whether appellant continued to be disabled. Consequently, the Office did not meet its burden of proof in terminating appellant's compensation on August 20, 1996.<sup>4</sup>

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<sup>2</sup> 5 U.S.C. § 8123(a).

<sup>3</sup> Appellant also submitted evidence subsequent to the August 20, 1996 decision including a September 11, 1996 report, from Dr. Pinckney who noted that appellant had undergone neck surgery in January 1996 and reiterated his prior diagnoses and conclusions. In a report dated March 17, 1997, that was submitted to the Office on July 27, 1997, Dr. Erico Cardosa, a Board-certified neurosurgeon, noted findings on examination of appellant's lower extremities and advised that, while he could not perform heavy duty or deliver mail, he could perform light duty. Appellant also submitted a July 3, 1997 magnetic resonance imaging scan of the lumbar spine which demonstrated central disc herniations at L4-5 and L5-S1 and a disc bulge at L3-4.

<sup>4</sup> See *Gail D. Painton*, 41 ECAB 492 (1990). To resolve this conflict, the Office should have referred the case record, including all test results, and a statement of accepted facts to a Board-certified specialist for resolution of the conflict.

The decisions of the Office of Workers' Compensation Programs dated October 17 and April 25, 1997 are hereby reversed.

Dated, Washington, D.C.  
December 2, 1999

Michael J. Walsh  
Chairman

David S. Gerson  
Member

A. Peter Kanjorski  
Alternate Member