

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of EDNA B. SMURTHWAITE and U.S. POSTAL SERVICE,  
POST OFFICE, Charlotte, N.C.

*Docket No. 97-1105; Submitted on the Record;  
Issued March 23, 1999*

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DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation effective September 17, 1995.

In the present case the Office accepted that appellant sustained contusions of the left hip, leg, shoulder and right side of the head and low back strain, in the performance of duty on July 21, 1986 when she fell out of her wheel chair. By decision dated October 19, 1993, the Office terminated appellant's compensation effective November 14, 1993. In a decision dated January 27, 1995, an Office hearing representative set aside the termination decision on the grounds that the Office did not properly follow its procedures in referring appellant for an impartial medical examination under 5 U.S.C. § 8123(a).<sup>1</sup> The Office then selected Dr. Michael J. Broom, a Board-certified orthopedic surgeon, as an impartial medical specialist and referred appellant for an examination.

By decision dated August 22, 1995, the Office terminated appellant's compensation effective September 17, 1995. An Office hearing representative affirmed the termination by decision dated November 13, 1996.

The Board has reviewed the record and finds that the Office met its burden of proof in terminating appellant's compensation effective September 17, 1995.

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

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<sup>1</sup> See *Henry J. Smith, Jr.*, 43 ECAB 524; *reaff'd on recon.*, 43 ECAB 892 (1992) (the Office must notify appellant and the physician selected that the examination was being arranged to resolve a conflict under section 8123(a), and provide appellant an opportunity to raise any objection to the selected physician prior to examination).

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.<sup>2</sup>

In the present case the Office found a conflict in the medical evidence between appellant's attending physician, Dr. Todd M. Chapman, an orthopedic surgeon, and Dr. Edward F. Swan, an orthopedic surgeon selected as a second opinion referral physician, on the issue of whether appellant continued to have an employment-related condition. Section 8123(a) of the Federal Employees' Compensation Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.<sup>3</sup> In this case the initial physician selected, Dr. Jack L. Vesano, a Board-certified orthopedic surgeon, did not properly resolve the issues presented. Dr. Vesano indicated in a November 26, 1991 report, that appellant's pain appeared to be related to the employment injury since she was able to function fairly independently prior to the injury,<sup>4</sup> but when asked for clarification he indicated in a July 28, 1992 report that he had no explanation as to why the pain was persisting.

The Office then selected Dr. Lockert as an impartial medical specialist, but the hearing representative found that his report was not sufficient to resolve the conflict due the Office's failure to notify appellant and Dr. Lockert that the examination was for the purpose of resolving a conflict.

The Board finds that Dr. Broom did provide a reasoned opinion that appellant's employment-related condition had resolved. In a report dated March, 1995, he provided a history and results on examination. Dr. Broom indicated that appellant had preexisting paralytic scoliosis and postlaminectomy kyphosis. He further stated that a patient with such a severe spinal deformity may not have the reserve to compensate for even a minor injury, and "it is reasonable that this minor injury contributed to worsening of symptoms, although passage of time, weight gain and obesity, may also have contributed to her present degree of disability." From this statement it would appear that Dr. Broom is speculating that the employment injury may be contributing to a current disability; there are, however, additional statements from Dr. Broom which clarify his opinion. In the March 9, 1995 report, Dr. Broom stated that it was "conceivable that the fall did indeed aggravate her preexisting spinal condition, but this statement can only be made based on purely subjective criteria, namely that the patient states that she continues to hurt worse and is unable to work since her fall. Certainly, there is no objective way

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<sup>2</sup> *Patricia A. Keller*, 45 ECAB 278 (1993).

<sup>3</sup> *Robert W. Blaine*, 42 ECAB 474 (1991); 5 U.S.C. § 8123(a).

<sup>4</sup> The absence of symptoms prior to an incident is not itself sufficient rationale to establish causal relationship with employment; see *Walter J. Nemann, Sr.*, 32 ECAB 69, 72 (1980).

to state that the condition was permanently aggravated by the fall at work.” In an April 5, 1995 report, Dr. Broom stated:

“In answer to your specific questions, I cannot state with any degree of medical probability that [appellant]’s July 21, 1986 fall at work aggravated or accelerated her preexisting spinal condition. There is no objective evidence to make this statement. I do feel that she did have a temporary exacerbation, but there is no objective evidence that there was a permanent aggravation or worsening of her spinal condition due to the July 1986 injury.”

Dr. Broom further explained in a June 9, 1995 report:

“I feel that the contusions and strains sustained by [appellant] should have resolved at this point. I think any temporary exacerbation of her spinal condition is now resolved. As you know, [appellant] has continued to complain of increasing pains and limitations since her injury, but there has been no objective evidence of worsening of her spinal condition which I can attribute to the fall alone.”

Dr. Broom has therefore provided an opinion that appellant’s accepted employment injuries had resolved, and while there may have been a temporary exacerbation of her underlying spinal condition, this had resolved with no objective evidence of any permanent aggravation due to the employment injury. It is well established that when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.<sup>5</sup> The Board finds that Dr. Broom has provided a reasoned opinion, based on a complete background, which is entitled to special weight.

Since the weight of the medical evidence indicates that appellant’s employment-related residuals had ceased, the Office met its burden of proof in terminating compensation in this case.

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<sup>5</sup> *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

The decision of the Office of Workers' Compensation Programs dated November 13, 1996 is affirmed.

Dated, Washington, D.C.  
March 23, 1999

George E. Rivers  
Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member