

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SYLVIA P. HUGHES and U.S. POSTAL SERVICE,
POST OFFICE, Cuyahoga Falls, OH

*Docket No. 99-142; Submitted on the Record;
Issued November 16, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, 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 March 29, 1998.

In the present case, appellant filed a claim on July 9, 1970 alleging that she sustained a left arm injury causally related to lifting mailbags in the performance of duty. The record indicates that appellant worked from April 11 to May 18, 1970, and did not return to work at the employing establishment. The Office accepted the claim for lateral epicondylitis of the left elbow. Appellant began receiving compensation for temporary total disability, which was subsequently adjusted to reflect her wage-earning capacity as a bank teller.

The Office initially terminated appellant's compensation by decision dated October 1, 1987. This decision was vacated and appellant continued to receive compensation based on a loss of wage-earning capacity.

In a letter dated January 13, 1998, the Office notified appellant that it proposed to terminate her compensation on the grounds that the weight of the medical evidence established that her injury-related disability had ceased. By decision dated February 17, 1998, the Office terminated appellant's compensation for wage loss effective March 29, 1998. In a decision dated September 10, 1998, an Office hearing representative affirmed the termination decision.

The Board has reviewed the record and finds that the Office met its burden of proof in terminating appellant's 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 her 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

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

The Board also notes that, with respect to wage-earning capacity, the burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.²

In this case, the Office found a conflict in the medical evidence with respect to appellant's continuing employment-related disability. The attending physician, Dr. George A. Hunter, an orthopedic surgeon, continued to indicate that appellant remained disabled as a result of epicondylitis of the elbow. The Office referred appellant, along with medical records and a statement of accepted facts, to Dr. Moses Leeb, an orthopedic surgeon. In a report dated April 15, 1996, Dr. Leeb stated in pertinent part that the functional impairments usually seen with lateral epicondylitis were no longer present and based on her history of one month of employment and the lack of direct injury such as a direct blow to the elbow, it was very unlikely that any complaints of pain were causally related to employment. In a report dated August 7, 1996, Dr. Leeb reiterated his opinion on causal relationship.

The Office referred appellant to Dr. Ralph J. Kovach, a Board-certified orthopedic surgeon, to resolve the conflict in the medical evidence.³ In a report dated February 7, 1997, Dr. Kovach provided a history and results on examination. He indicated that appellant was restricted to lifting 20 pounds. In a supplemental report dated September 4, 1997, Dr. Kovach stated that x-rays were normal except for a smoothing of the lateral epicondyle, which was not interpreted to be an abnormality or a cause of appellant's complaints. He further stated, "My examination did not reveal any findings of lateral epicondylitis existing. At the time that I examined her, all findings regarding the elbow were negative. Also, there are no residuals present from the work-related lateral epicondylitis of the left elbow."

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.⁴ The Board finds that Dr. Kovach provided an unequivocal opinion that residuals of the employment injury

² *Id.*

³ 5 U.S.C. § 8123(a) 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.

⁴ *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

had ceased.⁵ The Board accordingly finds that he represents the weight of the medical evidence in this case.

The decision of the Office of Workers' Compensation Programs dated September 10, 1998 is affirmed.

Dated, Washington, D.C.
November 16, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

⁵ The Board notes that Dr. Kovach also stated that appellant could not lift 70 pounds and, therefore, could not work as a distribution clerk. In the February 17 and September 10, 1998 decisions, the Office finds that because Dr. Kovach stated that these were prophylactic restrictions, it was merely a fear of future injury and, therefore, not compensable. His reports, however, clearly state that appellant could not lift 70 pounds, a requirement of the date-of-injury job of distribution clerk, and if he had related this restriction to the employment injury then his reports could not support termination of compensation. The reason his reports are sufficient to terminate compensation is because Dr. Kovach found that residuals of the employment injury had ceased and any continuing restrictions are not considered employment related.