

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ANDRE' P. HOULEMARD and U.S. POSTAL SERVICE,  
POST OFFICE, Los Angeles, CA

*Docket No. 98-62; Submitted on the Record;  
Issued October 28, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs met its burden to terminate appellant's benefits effective November 26, 1996.

On October 31, 1978 appellant, then a 44-year-old letter carrier, filed a notice of traumatic injury alleging that he injured his lower back on October 7, 1978 in the course of his federal employment. The Office accepted the claim for an aggravation of degenerative disc disease, lumbar.<sup>1</sup> The Office subsequently placed appellant on the periodic rolls to receive compensation for total temporary disability.

On January 12, 1987 the Office requested that Dr. Stanley Josephs, an orthopedic surgeon, provide a second opinion examination.

On May 4, 1987 Dr. Josephs indicated that appellant was not totally disabled from all work activity. Consequently, on July 29, 1987 he submitted a work restriction evaluation indicating that appellant could sit for eight hours per day, that he could intermittently walk, lift, or stand for two hours per day and that he could not bend, squat, climb, kneel or twist. He stated that appellant could lift 0 to 10 pounds.

On October 20, 1987 the Office offered appellant to a limited-duty position based on Dr. Josephs' restrictions.

On November 16, 1987 the Office indicated that the position was suitable and advised appellant that if he refused the position he would not be entitled to compensation.

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<sup>1</sup> The Office previously accepted that on February 6, 1973 appellant sustained a degenerative fifth lumbar disc and resolving sciatic radiculitis involving the S-1 nerve root in the course of his federal employment.

On December 1, 1987 Dr. Eddie L. Gaines, appellant's treating physician and a family practitioner, submitted a work restriction evaluation indicating that appellant was totally disabled.

On May 5, 1988 the Office requested a referee examination.

On May 11, 1989 Dr. Michael Paoletti, a Board-certified orthopedic surgeon, rendered his referee examination. He indicated that appellant's electromyography was normal and that his magnetic resonance imagings showed no disc herniations. Dr. Paoletti noted mild degenerative changes in the lumbosacral spine and that this condition was the one that contributed to appellant's disability since 1978. He stated that appellant had reached maximum medical improvement. Dr. Paoletti stated that he found no objective evidence of disability on examination. He stated that appellant could return to work with no heavy lifting, bending or stooping. Dr. Paoletti stated that he would attribute 50 percent of appellant's present condition to the work injury of 1978 and 50 percent to general aging or degenerative arthritis. Dr. Paoletti reviewed appellant's history in an earlier report dated April 12, 1989.

On August 15, 1991 the employing establishment offered appellant a limited-duty position.

On September 17, 1991 the Office indicated that it found the position offered suitable and allowed appellant 30 days to either accept the position or provide an explanation for refusing it.

By decision dated October 28, 1991, the Office terminated compensation on the basis that he refused an offer of suitable light duty. In an accompanying memorandum, the Office indicated that the opinion of Dr. Paoletti, the referee physician, was entitled to the weight of the medical evidence. The Office indicated that Dr. Paoletti offered work restrictions within those provided by the limited-duty job offer.

Appellant subsequently requested a hearing.

By decision dated March 13, 1992, an Office hearing representative determined that the Office failed to meet its burden to terminate appellant's compensation and restored appellant's compensation. In this regard, the Office indicated that Dr. Paoletti did not have a current position description on which to base an opinion of job suitability.

On May 7, 1992 the Office referred appellant, along with a statement of accepted facts, to Dr. Clayton Patchett, a Board-certified orthopedic surgeon, to resolve a conflict in the medical opinions.

On July 27, 1992 Dr. Patchett diagnosed low back pain syndrome, cervical-thoracic pain with left arm radiculopathy and obesity. He concluded that he needed to review further tests, including previously completed magnetic resonance imagings, before offering an opinion on appellant's disability or return to work.

On September 9, 1992 Dr. Patchett indicated that he could not resolve the conflict between the positive myelograms performed early in this case and the more recent magnetic

resonance imagings, which were negative. Dr. Patchett further indicated that he needed to perform a B-200 back evaluation test in order to determine appellant's work restrictions.

On November 11, 1992 Dr. Patchett indicated that he was reluctant to perform the B-200 evaluation because appellant indicated that his opinion might be biased. On December 3, 1992 the Office instructed Dr. Patchett to proceed with the test. The Office specifically asked Dr. Patchett to address whether appellant had recovered from the industrial injury. By letters dated February 25 and March 25, 1993, Dr. Patchett indicated that appellant refused to undergo the B-200 test. On July 26, 1993 the Office requested that Dr. Patchett reschedule the test. On that same date, the Office directed that appellant undergo the B-200 test and advised him that refusal to do so could result in a suspension of compensation pursuant to 20 C.F.R. § 8123(d). On July 30, 1993 appellant indicated that he did not refuse to take the B-200 test. Appellant then underwent the B-200 test on August 31, 1993. The record reflects, however, that Dr. Patchett did not respond to the Office's request for additional information.

On September 13, 1995 the Office requested a second opinion from Dr. Ronald D. Levin, a Board-certified orthopedic surgeon. The Office requested that Dr. Levin address whether appellant continue to suffer residuals from his work-related injury.

On January 19, 1996 Dr. Levin reviewed appellant's medical records and conducted a physical examination. Dr. Levin noted appellant's history of injuries and recorded his complaints of radiating back pain. Following his examination of appellant's back and lower extremities, he indicated that appellant was exaggerating his complaints. Dr. Levin reviewed the x-rays and magnetic resonance imagings of record and concluded that there was degenerative arthritis of the lumbar spine. He stated that the effects of appellant's work injuries had resolved and that appellant had no industrial conditions. He indicated that appellant had a naturally progressing degenerative condition. He stated that appellant's total disability related to his spine ceased three months following the 1978 injury.

On October 3, 1996 the Office issued a "[n]otice of [p]roposed [t]ermination of [c]ompensation." The Office found that the weight of the medical evidence, as represented by Dr. Levin's report, established that appellant no longer had a continuing work-related disability. The Office allowed appellant 30 days to submit additional evidence or argument. In an accompanying memorandum, the Office indicated that the weight of the medical evidence rested with Dr. Levin.

Appellant subsequently submitted a letter urging that Dr. Levin's opinion was biased and that he was not medically qualified to offer an opinion.

By decision dated November 26, 1996, the Office terminated appellant's benefits effective November 26, 1996 on the basis that appellant recovered from the effects of the October 7, 1978 injury no later than that date. In an accompanying memorandum, the Office noted that Dr. Levin's medical opinion remained the weight of the medical evidence.

The Board finds that the Office improperly terminated appellant's compensation benefits due to unresolved conflict of medical opinion.

In the present case, the Office found that a conflict existed in the medical opinion evidence between Dr. Gaines, appellant's treating physician and a family practitioner, who supported continued, employment-related disability and the opinion of Dr. Josephs, an Office referral physician and an orthopedic surgeon, who indicated that appellant was only partially disabled. Consequently, the Office referred appellant to Dr. Paoletti, a Board-certified orthopedic surgeon, to provide a referee opinion. Based on Dr. Paoletti's May 11, 1989 opinion, the Office terminated appellant's benefits in its October 28, 1991 decision inasmuch as his opinion established that appellant refused suitable employment. By decision dated March 13, 1992, however, an Office hearing representative found that the Office erred in relying upon Dr. Paoletti's opinion to terminate benefits because he did not have a current position description on which to base an opinion of job suitability.

As a result of the hearing representative's decision, the Office subsequently referred appellant to Dr. Patchett so that he could provide a referee examination resolving the conflict that remained in the medical opinion evidence. In his initial report dated July 27, 1992, Dr. Patchett indicated that he needed to review and perform additional tests prior to rendering his opinions. Dr. Patchett repeated this assertion in his report dated September 9, 1992. Appellant underwent the additional testing requested by Dr. Patchett on August 31, 1993. The record, however, is devoid of an opinion rendered by Dr. Patchett, which resolves the conflict in the medical evidence.

When the Office secures an opinion from an impartial specialist and the opinion of the specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report. However, when the impartial specialist's statement of clarification or elaboration is not forthcoming or if the physician is unable to clarify or elaborate on his original report or if the supplemental report is also vague, speculative or lacks rationale, the Office must refer appellant to a second impartial specialist for a rationalized medical report on the issue in question.<sup>2</sup>

Because the Office failed to obtain a sufficient report from a referee examiner resolving the conflict in the medical opinion evidence, the Office must refer appellant and the case record to an appropriate impartial specialist to resolve the remaining conflict. Moreover, the Office erred in sending appellant to Dr. Levin, a Board-certified orthopedic surgeon, for a second opinion examination, prior to obtaining the opinion of an impartial specialist.<sup>3</sup>

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<sup>2</sup> *Harold Travis*, 30 ECAB 1071 (1979).

<sup>3</sup> *See Carlton Owens*, 36 ECAB 608 (1985).

The decision of the Office of Workers' Compensation Programs dated November 26, 1996 is reversed.

Dated, Washington, D.C.  
October 28, 1999

Michael J. Walsh  
Chairman

George E. Rivers  
Member

Michael E. Groom  
Alternate Member