

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAUL BUTERA and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Pittsburgh, PA

*Docket No. 97-994; Submitted on the Record;
Issued September 28, 1999*

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation for wage loss effective March 31, 1996.

In the present case, appellant, then a 51-year-old psychiatric nurse, filed a claim alleging that he sustained an injury in the performance of duty on January 29, 1989, when he fell to the floor after attempting to sit on a chair. The Office accepted the claim for a low back strain and herniated disc, L3-4. Appellant underwent back surgery on April 26, 1990 and he began receiving compensation for temporary total disability on the periodic rolls.

By letter dated January 30, 1996, the Office notified appellant that it proposed to terminate his compensation on the grounds that the weight of the medical evidence, as represented by Dr. Robert Yanchus, a Board-certified orthopedic surgeon, selected as an impartial medical specialist, established that his employment-related disability had ceased. In a decision dated March 12, 1996, the Office terminated appellant's compensation effective March 31, 1996. By decision dated November 26, 1996, the Office denied modification of the prior 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 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.¹

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

In this case, the Office found that a conflict in the medical evidence existed between an attending physician, Dr. Francis Ferraro, a neurosurgeon and Dr. Herbert R. Tauberg, an orthopedic surgeon, with respect to appellant's continuing employment-related disability. Dr. Ferraro indicated in a June 18, 1993 report that appellant was limited to 4 hours per day in sedentary work, with a 15-pound lifting restriction. The Office referred appellant, along with medical records and a statement of accepted facts, to Dr. Tauberg. In a report dated December 13, 1994, he provided a history and results on examination, stating that appellant was status post low back surgery and could perform sedentary work. Dr. Tauberg provided work restrictions in a form report dated December 13, 1994 and in a report dated March 20, 1995, opined that appellant was capable of working eight hours per day in a sedentary position.

The record, therefore, was in conflict as to the extent of appellant's continuing employment-related disability. 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.² 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), to resolve the conflict in the medical evidence.³

In this case, the Office referred appellant, medical records and a statement of accepted facts to Dr. Yanchus to resolve the conflict. In a report dated September 21, 1995, Dr. Yanchus provided a history, results on examination and reviewed medical records. He further stated in pertinent part:

"It is my opinion based on today's exam[ination] that the claimant has made an excellent recovery from his lumbar disc surgery at L3-4 left on April 26, 1990 which is 5½ years ago.

"It is my opinion at this point in time [that] the claimant is seven years post injury and 5½ years post op that he could return to his regular job as a psychiatric nurse. Actually [return to work] at this point would be beneficial overall from the standpoint of giving the claimant a structured lifestyle, improving self-esteem and by being busy would reduce any tendencies for subjective complaints. There is absolutely no indication for any further diagnostic studies, enrollment in work hardening or chronic pain programs."

The Board finds that Dr. Yanchus provided a reasoned medical opinion based on a complete factual and medical background, that appellant's employment-related disability had ceased. 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

² *Robert W. Blaine*, 42 ECAB 474 (1991); 5 U.S.C. § 8123(a).

³ *William C. Bush*, 40 ECAB 1064 (1989).

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

Board finds that the opinion of Dr. Yanchus is entitled to special weight and represents the weight of the medical evidence. Accordingly, the Board finds that the Office met its burden of proof in terminating compensation effective March 31, 1996.

After termination or modification of benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that he had an employment-related disability which continued after termination of compensation benefits.⁵

In this case, appellant submitted an August 22, 1996 report from Dr. Ferraro, reiterating his opinion that appellant was capable of working 4 hours per day with a 15-pound lifting restriction. The report from him is similar to previous reports and since Dr. Ferraro was on one side of the conflict resolved by Dr. Yanchus, the August 22, 1996 report is insufficient to create a new conflict.⁶

Appellant also submitted an October 2, 1996 report from Dr. Andrew D. Kranik, a Board-certified orthopedic surgeon, who provided a history and results on examination. Dr. Kranik diagnosed lumbosacral sprain/strain syndrome, lumbosacral radiculitis, lumbosacral radiculopathy, herniated nucleus pulposus, L3-4, status post hemi laminectomy and degenerative disc disease. He stated, "I think that I can state with a reasonable degree of medical certainty that the above diagnoses are caused by the patient's work-related injury and he has remained symptomatic in spite of surgery." Dr. Kranik did not provide additional explanation or medical reasoning to support his opinion. Medical opinions that are speculative and not supported by medical rationale are generally entitled to little probative value and are insufficient to meet appellant's burden of proof.⁷ The Board finds that the medical evidence submitted after the March 12, 1996 termination decision is insufficient to establish a continuing employment-related disability.

⁵ *Talmadge Miller*, 47 ECAB 673, 679 (1996); *see also George Servetas*, 43 ECAB 424 (1992).

⁶ *Josephine L. Bass*, 43 ECAB 929, 939 (1992).

⁷ *Carolyn F. Allen*, 47 ECAB 240 (1995).

The decisions of the Office of Workers' Compensation Programs dated November 26 and March 12, 1996 are affirmed.

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

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member