

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DAVID R. BAUER and U.S. POSTAL SERVICE,  
POST OFFICE, PREUSS STATION, Los Angeles, CA

*Docket No. 99-1136; Submitted on the Record;  
Issued July 27, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation effective November 12, 1997.

On September 20, 1984 appellant, then a 25-year-old carrier, sustained an employment-related acute lumbar strain and laceration of his left hand when he fell into a hole while delivering mail. He was initially off work for approximately two months and sustained two recurrences of disability, the most recent on April 4, 1986. Appellant has not worked since. By decision dated June 1, 1992, the Office reduced his compensation, effective May 31, 1992, to reflect that he had the wage-earning capacity of an accounting clerk.

By letter dated September 16, 1996, the Office informed appellant that it needed a current medical report and Dr. Sylvester Sailes, a Board-certified family practitioner, provided a report dated January 10, 1997. The employing establishment provided an investigative report dated February 24, 1997 and in a letter dated March 10, 1997, the Office requested that Dr. Sailes provide a supplementary report, which he did on June 17, 1997. By letter dated July 11, 1997, the employing establishment informed the Office that appellant was in prison for a parole violation of a felony conviction. A telephone memorandum dated October 8, 1997 indicates that appellant was released from prison on September 27, 1997.

By letter dated October 21, 1997, the Office informed appellant that it needed further information before reinstating compensation. The Office specifically requested start and release dates of his imprisonment, the reason for the imprisonment and a complete medical report. Appellant was referred to Dr. Frank Cunningham, a Board-certified orthopedic surgeon, for a second-opinion evaluation who, in a report dated November 24, 1997, advised that appellant could return to regular duty. By decision dated January 12, 1998, the Office terminated appellant's compensation, effective November 12, 1997, on the grounds that he had recovered from the September 20, 1984 employment injury. In the attached memorandum, the Office noted that, as appellant was not receiving compensation and had provided no medical evidence

supporting any work-related disability since his release from jail, a pretermination notice was not required. On February 10, 1998 appellant requested a hearing that was held on September 16, 1998. In a November 23, 1998 decision, an Office hearing representative affirmed the prior decision. The instant appeal follows.

The Board finds that the Office properly terminated appellant's compensation, but as of November 24, 1997.

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>

The medical evidence relevant to the termination of appellant's compensation includes a January 10, 1997 report from Dr. Sailes, who diagnosed acute and chronic lumbosacral strain and advised that appellant still had difficulties with pain. Following requests by the Office for additional information, in a June 17, 1997 report, Dr. Sailes advised that he had seen appellant on one occasion "in a great deal of time" and noted that no abnormalities had been found on his physical examination. On October 23, 1997 the Office referred appellant, along with the medical record, a set of questions and the statement of accepted facts, to Dr. Frank Cunningham, a Board-certified orthopedic surgeon, for a second-opinion evaluation. In a comprehensive report dated November 24, 1997, he diagnosed status post lumbar strain with no radiculitis or radiculopathy which had resolved and advised that appellant could return to his regular duty. In an attached work capacity evaluation, Dr. Cunningham indicated that appellant could work eight hours per day with no restrictions.

The Board finds that the weight of the medical evidence rests with the well-rationalized conclusion of Dr. Cunningham that appellant no longer suffers residuals of the accepted employment injury. The record does not contain a rationalized medical opinion from appellant's physician, Dr. Sailes, who advised that physical examination was normal and stated that he based his conclusion that appellant continued to be disabled on appellant's complaints of pain. The Board, therefore, finds that Dr. Cunningham's opinion is sufficiently probative to support the termination of compensation benefits for the accepted condition of lumbar strain.

While the medical evidence of record clearly establishes that appellant no longer has residuals of his accepted injury, the Board notes that in terminating his compensation benefits on this ground the Office did not provide any pretermination notice. The record indicates that appellant was imprisoned for a felony conviction. Section 8148(b)(3) of the Federal Employees' Compensation Act provides that compensation payments are to be suspended for conviction and imprisonment for a felony.<sup>2</sup> Office procedures, however, provide that benefits must be restored

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

<sup>2</sup> 5 U.S.C. § 8148(b)(3).

when a claimant is released from prison.<sup>3</sup> Here, following appellant's release from prison, his compensation was not restored by the Office. Office procedures further provide that a pretermination notice is required to terminate compensation in all cases where benefits are being paid on the periodic rolls.<sup>4</sup> Due to an Office error, appellant's compensation was not restored upon his release from prison. As the record establishes that appellant's claim should have been returned to the periodic rolls, the Board finds that a pretermination notice should have been provided in this case. The Board finds, therefore, that appellant is entitled to compensation for his accepted condition for the period September 27, 1997, the date he was released from prison, to November 24, 1997, the date Dr. Cunningham found no continuing residual disability attributable to the employment injury.<sup>5</sup> There is no medical evidence establishing continuing employment-related disability due to the accepted condition following Dr. Cunningham's November 24, 1997 report. For this reason, appellant is not entitled to compensation beyond that date.

The decision of the Office of Workers' Compensation Programs dated November 23, 1998 is affirmed as modified to reflect that appellant is entitled to compensation for the period September 27 to November 24, 1997.

Dated, Washington, D.C.  
July 27, 2000

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Member

Michael E. Groom  
Alternate Member

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<sup>3</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.12(e)(3) (March 1997).

<sup>4</sup> *Id.* at Chapter 2.1400.6(a) (March 1997).

<sup>5</sup> See *Teresa B. Russ*, 47 ECAB 444 (1996).