

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JOEL B. KELLY and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL CENTER, Battle Creek, MI

*Docket No. 00-893; Oral Argument Held January 23, 2001;  
Issued May 23, 2001*

Appearances: *Stuart H. Deming, Esq.*, for appellant; *Catherine P. Carter, Esq.*,  
for the Director, Office of Workers' Compensation Programs.

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DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI,  
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation effective September 14, 1999.

The Office accepted that appellant sustained cervical, dorsal, lumbar and left shoulder strains, as well as left hip bursitis and aggravation of a herniated disc at L4-5 while in the performance of duty on April 20, 1994.

By letter dated July 29, 1999, the Office proposed to terminate appellant's compensation on the grounds that residuals of his employment-related conditions had ceased. In a decision dated September 14, 1999, the Office terminated appellant's compensation.

The Board finds that the Office did not meet 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.<sup>1</sup>

In this case, the Office determined that the June 9, 1999 report of Dr. Dennis Szymanski, a Board-certified neurosurgeon, constituted the weight of the evidence and established that employment-related residuals had ceased. Although the Office found that Dr. Szymanski was an impartial medical specialist under 5 U.S.C. § 8123(a), the medical evidence was not in conflict

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

on the issue of whether employment-related residuals had ceased. The second opinion referral physician, Dr. John L. Kihm, an orthopedic surgeon, did not clearly opine that all residuals of the employment injury had ceased.

In his November 16, 1998 report, Dr. Kihm noted, for example, slight neurological residual from the back surgery, and the Office accepted the back surgery as employment related. He reported that appellant had symptoms from spondylolisthesis, without clearly discussing a causal relationship with the employment injury. Dr. Kihm does not offer an affirmative opinion that employment-related residuals had ceased. Therefore, the Board finds that the medical opinion evidence was not in conflict, and Dr. Szymanski's opinion is not entitled to the special weight given an impartial medical specialist when resolving a conflict.<sup>2</sup>

As a second opinion physician, the Board finds that Dr. Szymanski's opinion is not sufficiently probative to represent the weight of the evidence. In his June 9, 1999 report, Dr. Szymanski stated that he found no evidence of residual neurologic or orthopedic abnormalities, without providing further explanation.

Dr. Szymanski also concluded that there was no causal relationship between the April 20, 1994 injury and the disc herniation operation. However, the Office accepted an aggravation of the disc herniation and the back surgery as employment related. Dr. Szymanski must base his opinions on the accepted facts and he did not do so in this case.

In addition, one of the questions posed to Dr. Szymanski was whether "there are any remaining residuals due solely to the April 20, 1994 work-related slipping incident." It is well established that an employment injury does not have to be the sole cause of an employee's condition, but need only have some contribution to it.<sup>3</sup> In a July 20, 1999 letter to appellant's representative, the Office acknowledged that the question was inappropriate, and also indicated that the statement of accepted facts would be expanded to include a more complete description of appellant's job duties. The Office did not, however, attempt to provide additional information to Dr. Szymanski or receive a clarifying supplemental report.

The Board finds that Dr. Szymanski did not provide a reasoned medical opinion, based on a complete and accurate factual and medical background, on the issue presented. His report is therefore of diminished probative value and is insufficient to meet the Office's burden of proof to terminate compensation.

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<sup>2</sup> *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

<sup>3</sup> *See Arnold Gustafson*, 41 ECAB 131 (1989).

The September 14, 1999 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, DC  
May 23, 2001

David S. Gerson  
Member

A. Peter Kanjorski  
Alternate Member

Priscilla Anne Schwab  
Alternate Member