

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROBERT FOSTER and U.S. POSTAL SERVICE,  
INTERNATIONAL & BULK MAIL CENTER, Jersey City, NJ

*Docket No. 00-931; Submitted on the Record;  
Issued September 10, 2001*

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DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits; (2) whether the refusal of the Office in its May 4, 1999 decision, to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

By decision dated September 23, 1996, appellant's claim was accepted for lumbosacral sprain. It was found that appellant, then a 31-year-old custodian, was pressed against a pole by a gondola on July 21, 1996 and suffered a low back injury. He received compensation benefits for total disability after continuation of pay ceased. Physician's reports were received from Drs. Edward Kalmar and Gautam Sehgal, diagnosing appellant as disabled due to a "LS sprain."

On October 1, 1996 the Office received a faxed report from Dr. David J. Greifinger, a Board-certified orthopedic surgeon, who examined appellant on August 20, 1996 and concluded that "patient is orthopedically cleared for resumption of work activities in full capacity." Appellant returned to work on September 23, 1996 and on September 27, 1996 claimed a recurrence of disability and has not worked since. By letter dated October 1, 1996, the Office requested a second opinion examination.

On March 10, 1997 a magnetic resonance imaging (MRI) scan was performed by Dr. Robert F. Traflet, a Board-certified radiologist, who found that appellant had "very mild degenerative changes in the lower thoracic spine" and "no herniated disc."

On June 5, 1997 appellant was seen by Dr. Arthur Canario, a Board-certified orthopedic surgeon, for a second opinion examination. By letter dated July 5, 1997, Dr. Canario stated: "I also find no significant evidence of orthopedic pathology. I feel the man is capable of employment in his regular duty and requires no further medical care."

Based on this examination, on September 2, 1997 the Office terminated appellant's compensation benefits finding the weight of the medical evidence of record established that his injury-related disability had ceased.

By letter dated July 1, 1998, appellant requested reconsideration. He submitted two reports dated August 20, 1997 and May 13, 1998 from Dr. Roderick Clemente, a Board-certified neurological surgeon, and a treatment note from Dr. Kalmar, dated September 11, 1997. In the August 20, 1997 report, Dr. Clemente stated: "This patient has no motor, sensory or reflex changes and he appears to have chronic lumbosacral strain." In the May 13, 1998 report, he opined that appellant continued to have no motor or sensory deficit but needed to lose some weight. In his note, Dr. Kalmar stated that appellant: "is out of work due to chronic lumbosacral pain ..." and "cannot work at this time."

By decision dated September 17, 1998, the Office denied appellant's request for reconsideration as the medical evidence submitted failed to provide any objective findings or rationale to support any continuing injury-related disability or symptomatology.

The Office received additional reports from Dr. Clemente dated October 14, 1998 and March 10, 1999.

By letter dated March 30, 1999, appellant again requested reconsideration. In his letter he contended that Dr. Canario was a "contractual doctor" and should not have been used.

By decision dated May 4, 1999, appellant's request for reconsideration was denied.

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits.

Under the Federal Employees' Compensation Act,<sup>1</sup> once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>2</sup> The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to employment.<sup>3</sup> After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant.<sup>4</sup> In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that he or she had an employment-related disability which continued after termination of compensation benefits.<sup>5</sup>

Appellant was examined by Dr. Greifinger on August 20, 1996, who opined that appellant was able to resume his work activities in full capacity. Based on this report, the Office

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> *Charles E. Minniss*, 40 ECAB 708, 716 (1989).

<sup>3</sup> *Id.*

<sup>4</sup> *Virginia Davis-Banks*, 44 ECAB 389 (1993).

<sup>5</sup> *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

requested a second opinion examination and referred appellant to Dr. Arthur T. Canario, who examined appellant on June 5, 1997, was provided a statement of accepted facts and copies of the medical records. Dr. Canario performed examinations of appellant's cervical and lumbosacral spine, stating:

“[H]e is able to accomplish full motion in flexion, extension, lateral bending and rotation ... he has a loss of 10 percent of flexion due to complaints of pain, but had full extension, lateral bending and rotation.”

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“I do not see any evidence of significant orthopedic pathology in my examination of [appellant]. I have reviewed my medical reports including Dr. Greifinger's reports from August 1996, approximately a month from the accident where he felt he had only contusions or sprains. An MRI done of his thoracic spine was normal.

“I also find no significant evidence of orthopedic pathology. I feel the man is capable of employment in his regular duty and requires no further medical care.”

The Office met its burden of proof to terminate appellant's compensation benefits based on Dr. Greifinger's August 20, 1996 report and Dr. Canario's July 5, 1997 report. Dr. Canario performed a complete examination based upon the accepted facts and medical evidence of record and provided an objective analysis supported by rationale finding that there was no significant evidence of orthopedic pathology and that appellant was capable of returning to work. As of September 2, 1997, the date the Office terminated appellant's compensation benefits, there was no medical evidence of record that appellant remained disabled.

Thereafter, appellant has the burden to establish continuing disability. In support of his claim for continuing disability, appellant submitted medical reports from Dr. Clemente and Dr. Kalmar. In a report dated August 20, 1997 from Dr. Clemente, he stated: “This patient has no motor, sensory or reflex changes and he appears to have chronic lumbosacral strain.” He further indicated that appellant was significantly out of shape and needed to lose weight, and opined that, if appellant had been out of work for over one year, the chances of him returning to his job were very slim. In a report dated May 13, 1998, Dr. Clemente stated: “patient continues to have no motor or sensory deficit, but does need to lose some weight.” In a report dated October 14, 1998, Dr. Clemente impressed: “once again, my diagnosis is chronic lumbosacral strain without a radiculopathic disease.” In a report dated May 10, 1999, Dr. Clemente again indicated that appellant was without motor or sensory deficits. In his final report dated June 15, 1998, Dr. Clemente concluded: “I have been unable to find any disability in this patient's physical examination. From a neurological point of view, I do not consider him disabled, but, again, this is certainly open to discussion.” In his reports, Dr. Clemente diagnosed appellant with chronic lumbosacral strain, but did not support his opinion with objective findings or medical rationale. He also stated that appellant had no motor, sensory or reflex changes. Furthermore, Dr. Clemente did not relate his perception of appellant's inability to work to the original July 21, 1996 injury, nor did he provide any objective findings of the work-related injury to support his disability. Dr. Clemente related appellant's inability to work to obesity.

In a treatment note dated September 11, 1997, Dr. Edward Kalmar referred to appellant, stating: “[appellant] is out of work due to chronic lumbosacral pain, he needs impact aerobics to recondition + cannot work at this time.” In his note, Dr. Kalmar did not provide any objective findings to support his opinion that appellant had disability and did not relate the disability to appellant’s July 21, 1996 injury.

Dr. Clemente’s reports and Dr. Kalmar’s treatment note do not establish that appellant was disabled after September 2, 1997, due to residuals of the accepted injury. Appellant has not met his burden of proof in establishing by the weight of the medical evidence that he had a disability which continued after termination of his compensation benefits.<sup>6</sup>

The Board also finds that the refusal of the Office in its May 4, 1999 decision to reopen appellant’s case for further consideration of the merits of his claim did not constitute an abuse of discretion.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees’ Compensation Act, the Office’s regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.<sup>7</sup>

The evidence submitted by appellant with his request for reconsideration consists of the medical reports from Dr. Clemente, dated October 14, 1998 and May 10, 1999, and the note from Dr. Kalmar dated September 11, 1997. Neither Dr. Clemente nor Dr. Kalmar provided any objective findings or rationale to support any continuing injury-related disability. Dr. Clemente stated that appellant “has no motor, sensory or reflex changes and he appears to have chronic lumbosacral strain” and Dr. Kalmar stated that appellant “is out of work due to chronic lumbosacral pain” and “cannot work at this time.”

Evidence that repeats or duplicates evidence already in the record has no evidentiary value and does not constitute a basis for reopening a case.<sup>8</sup> Appellant contended that Dr. Canario was a “contract” physician, and therefore his opinion was of limited probative value. Although the reopening of a case for merit review may be predicated solely on a legal premise, such reopening is not required when the contention does not have a reasonable color of validity.<sup>9</sup> Pursuant to 20 C.F.R. § 10.320, the Office may require that the employee submit to examination by a qualified physician as often and at such times and places as the Office considers reasonably necessary.

Appellant has not established that the Office abused its discretion in its September 17, 1998 and May 4, 1999 decisions by denying his request for review on the merits of his claim

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<sup>6</sup> *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

<sup>7</sup> 20 C.F.R. § 10.606(b)(2).

<sup>8</sup> *Paul Kovash*, 49 ECAB 350 (1998).

<sup>9</sup> *Sherry A. Hunt*, 49 ECAB 467 (1998).

under section 8128(a) of the Act, because he has failed to show that the Office erroneously applied or interpreted a point of law, that he advanced a point of law or a fact not previously considered by the Office or that he submitted relevant and pertinent evidence not previously considered by the Office.

The decisions of the Office of Workers' Compensation Programs dated May 4, 1999 and September 17, 1998 are hereby affirmed.

Dated, Washington, DC  
September 10, 2001

Willie T.C. Thomas  
Member

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member