

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAUL E. O'NEIL, SR. and U.S. POSTAL SERVICE,
POST OFFICE, Williamsville, NY

*Docket No. 00-861; Submitted on the Record;
Issued April 8, 2002*

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 in terminating appellant's compensation benefits on the basis that he no longer had any continuing disability or residuals due to his accepted employment injuries of December 15, 1986 and October 12, 1988.

Appellant, a letter carrier, sustained employment-related traumatic injuries on December 15, 1986 and October 12, 1988. The Office accepted appellant's 1986 claim for left groin strain and mild hematoma and his 1988 claim was accepted for lumbar strain and temporary aggravation of spondylolisthesis at L5-S1. Appellant did not return to work following his October 12, 1988 employment injury and he received appropriate wage-loss compensation for his accepted injuries.

By decision dated October 7, 1998, the Office terminated appellant's compensation and medical benefits on the basis that he no longer had any continuing disability or residuals due to his accepted injuries of December 15, 1986 and October 12, 1988.¹ Appellant subsequently requested an oral hearing, which was held on September 30, 1999. In a decision dated November 24, 1999, the Office hearing representative affirmed the Office's October 7, 1998 decision terminating appellant's compensation and medical benefits.

The Board finds that the Office failed to meet its burden of proof in terminating appellant's compensation and medical benefits.

¹ The Office previously issued a notice of proposed termination of compensation on September 3, 1998. The Office terminated appellant's medical benefits effective October 7, 1998 and the termination of wage-loss compensation was effective October 10, 1998.

Once the Office has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.² Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.³ The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.⁴ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.⁵

In terminating appellant's compensation and medical benefits, the Office initially relied on the July 21, 1998 report of Dr. E. Robert Wilson, Jr., a Board-certified orthopedic surgeon and Office referral physician. In his report, Dr. Wilson explained that his examination and review of appellant's file failed to reveal any objective evidence of an orthopedic condition referable to the specific act of picking up mail on December 15, 1986 and lifting a sack of empty sacks on October 12, 1988. He further noted that while the October 21, 1988 magnetic resonance imaging (MRI) scan of the lumbar spine referred to a "minimal" listhesis posteriorly at L5-S1, "[i]t was not a true spondylolisthesis." Dr. Wilson also stated that there was "no reason why [appellant] could not return to his regular work as a letter carrier at this time." Lastly, he indicated that he did not feel that any further medical treatment would influence the course of appellant's complaints of low back and lower extremity pain.

In affirming the Office's October 7, 1998 decision, the hearing representative was similarly persuaded by Dr. Wilson's July 21, 1998 opinion. Additionally, the hearing representative relied upon a series of surveillance photographs that depicted appellant performing various physical activities, which ostensibly were inconsistent with his claim of continuing disability.

Dr. Wilson found no objective evidence of continued impairment causally related to the December 15, 1986 and October 12, 1988 employment incidents. However, Dr. Gabino L. Baloy, an internist and appellant's treating physician, submitted a September 28, 1998 report and work restriction evaluation (Form OWCP-5), which indicated that appellant could work an eight-hour day with certain restrictions.⁶ Moreover, Dr. Baloy attributed appellant's current restrictions to his October 12, 1988 employment injury.

The record also includes a September 15, 1998 report from Dr. James J. White Jr., a Board-certified orthopedic surgeon, who had previously examined appellant in 1992, noted that a

² *Curtis Hall*, 45 ECAB 316 (1994).

³ *Jason C. Armstrong*, 40 ECAB 907 (1989).

⁴ *Furman G. Peake*, 41 ECAB 361, 364 (1990); *Thomas Olivarez, Jr.*, 32 ECAB 1019 (1981).

⁵ *Calvin S. Mays*, 39 ECAB 993 (1988).

⁶ Specifically, Dr. Baloy noted appellant could sit up to four hours, walk up to two hours and lift one hour per day. Additionally, he limited appellant's lifting to 10 pounds and further noted that appellant should be restricted to a 30-minute drive time and not be subjected to either extreme cold or heat.

recent MRI scan dated October 17, 1997 revealed evidence of degeneration at the L5-S1 level with slight central protrusion of the disc. He further noted that appellant has had ongoing problems for a decade with respect to the lumbar spine, but no dramatic increase in the objective findings on physical examination. Dr. White explained that he would allow appellant to do light to sedentary work with a 15-pound weight restriction, but avoiding repetitive lifting activities. He further indicated that bending should be kept to a minimum with no twisting. Dr. White also noted that appellant should restrict his driving activities to 30 to 45 minutes at any 1 period of time.

In a follow-up report dated October 21, 1998, Dr. White stated that appellant's disabilities as previously outlined were a direct result of his work-related accident of October 12, 1988. Dr. Baloy's follow-up report dated October 27, 1998, similarly stated that appellant's current disabilities were a direct result of his October 12, 1988 employment injury.⁷

The Federal Employees' Compensation Act provides that if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination.⁸ In the instant case, there is a conflict of medical opinion among Dr. Wilson, the Office referral physician, and appellant's physicians, Drs. White and Baloy. While the Office questioned the probative value of the opinions of Drs. White and Baloy, the Board finds this evidence sufficiently probative to warrant referral of the record to an impartial medical examiner. In light of the unresolved conflict of medical opinion, the Office failed to meet its burden of proof in terminating appellant's compensation and medical benefits.⁹

⁷ The October 21 and 27, 1998 reports of Drs. White and Baloy were submitted in response to the Office's October 7, 1998 decision wherein both physicians' opinions were determined to be of diminished probative value. A careful review of the record indicates that both Drs. White and Baloy have had long-standing relationships with appellant and that each is familiar with the circumstances surrounding appellant's employment-related injuries and his ongoing treatment. Thus, while neither physician's current report is particularly comprehensive or persuasive, it is imprudent to suggest that these opinions lack sufficient probative value because the doctors failed to reiterate certain background information that they previously demonstrated their full awareness of.

⁸ 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

⁹ Although appellant's counsel takes exception to the hearing representative's reliance on the surveillance photographs, the Board need not address the propriety of this action in light of our finding that the medical evidence of record is insufficient to meet the Office's burden to terminate compensation and medical benefits.

The November 24, 1999 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC
April 8, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member