

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL F. COTE and U.S. POSTAL SERVICE,
POST OFFICE, Tecumseh, MI

*Docket No. 01-873; Submitted on the Record;
Issued June 3, 2002*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's employment-related work restrictions had ceased by July 22, 1999.

Appellant was injured in the performance of duty on September 20, 1996 when he was struck by a motor vehicle while walking his letter carrier route. The Office accepted multiple contusions/abrasions, right hip contusion/hematoma, right ankle fracture and left shoulder acromioclavicular strain. Appellant returned to a light-duty position, sustained a recurrence of disability in May 1997 and again returned to light-duty work in August 1997.

In a letter dated June 18, 1999, the Office notified appellant that it proposed to terminate his work restrictions due to the employment injuries. By decision dated July 22, 1999, the Office determined that employment-related work restrictions had ceased. In decisions dated December 6, 1999 and December 26, 2000, the Office denied modification.

The Board finds that the Office met its burden of proof in this case.

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

In this case, appellant had returned to full-time light-duty work. The July 22, 1999 decision does not indicate that medical benefits were terminated. The decision finds that appellant no longer had work restrictions causally related to the accepted employment injuries.

With respect to work restrictions, the Office found that a conflict in the medical evidence existed. Dr. Thomas Brown, Jr., an orthopedic surgeon selected as a second opinion referral

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

physician, opined in an April 27, 1999 report that appellant could return to work as a letter carrier, initially at four hours per day and increasing to full time. An attending physician, Dr. Alan Snider, an osteopath, opined that appellant's employment injuries prevented him from working as a regular letter carrier.

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

To resolve the conflict, the Office referred appellant to Dr. Paul Kenyon, a Board-certified orthopedic surgeon. In a report dated December 2, 1998, Dr. Kenyon provided a history and results on examination. He reported that objective findings were minimal, with subjective numbness of the left hand reported. He suggested an electromyogram (EMG) of the left upper extremity, and stated that, if this was negative, he believed appellant could return to work as a letter carrier. In a report dated April 16, 1999, Dr. Kenyon indicated that he had reviewed the EMG and from an objective standpoint appellant could return to a regular job commensurate with his age. Dr. Kenyon concluded that he had reviewed the letter carrier job description and appellant could perform the position.

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 Board finds that Dr. Kenyon's opinion is entitled to special weight. He provided a reasoned opinion, based on a complete background, that appellant could work as a letter carrier.

Following the Office's decision appellant submitted the deposition testimony of Dr. Snider dated February 28, 2000. Additional reports from a physician on one side of the conflict that is properly resolved by an impartial specialist are generally insufficient overcome the weight accorded the impartial specialist's report or create a new conflict.⁵ As Dr. Snider was on one side of the conflict that was resolved by Dr. Kenyon, the weight of the evidence remains with Dr. Kenyon. Appellant also submitted a November 14, 2000 report from Dr. Jacquelyn Lockhart, a physical medicine specialist, who diagnosed chronic left C6 radiculopathy, left C5-6 disc herniation, residual right hip and thigh pain, and probable heterotopic bone formation. The Board notes that a cervical condition has not been accepted in this case. It is appellant's burden to establish a cervical disc herniation as employment related.⁶ Dr. Lockhart states that all of 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).

⁵ *See id.*; *Dorothy Sidwell*, 41 ECAB 857 (1990).

⁶ *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

diagnosed conditions were related to the September 1996 employment injury, without providing supporting medical rationale. With respect to a cervical injury, for example, Dr. Lockhart states only that at the time of injury emergency technicians used full cervical precautions; she does not discuss the subsequent medical treatment or otherwise clearly explain why she believed a cervical disc herniation was employment related. The Board finds that appellant has not established any additional conditions as employment related, and the evidence submitted after the July 22, 1999 decision is not sufficient to establish continuing employment-related work restrictions.

The decision of the Office of Workers' Compensation Programs dated December 26, 2000 is affirmed.

Dated, Washington, DC
June 3, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member