

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of SHUE W. CHIOU and U.S. POSTAL SERVICE,  
POST OFFICE, Van Nuys, CA

*Docket No. 98-847; Submitted on the Record;  
Issued August 24, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective September 29, 1997 on the grounds that she had no disability due to her June 9, 1990 employment injury after that date.

The Board finds that the Office improperly terminated appellant's compensation effective September 29, 1997 on the grounds that she had no disability due to her June 9, 1990 employment injury after that date.

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 the employment.<sup>3</sup> The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>4</sup>

On June 9, 1990 appellant, then a 37-year-old postal clerk, sustained a low back strain and bulging discs at T12-L1, L4-5 and L5-S1; the Office paid compensation for periods of disability. The Office terminated appellant's compensation effective October 15, 1995 based on the opinion of Dr. Stuart Baumgard, a Board-certified orthopedic surgeon to whom it referred appellant for a second opinion. By decision dated and finalized August 22, 1996, an Office hearing representative reversed the Office's termination of compensation on the grounds that

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

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

<sup>4</sup> *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

there was an unresolved conflict in the medical evidence between the government physician, Dr. Baumgard, and Dr. Lee C. Woods, appellant's attending Board-certified orthopedic surgeon, regarding whether appellant continued to have residuals of the June 6, 1990 employment injury.<sup>5</sup> The Office remanded the case for referral of appellant to a neurologist and an orthopedic surgeon for impartial medical examinations and opinions regarding her continuing disability.

On remand, the Office referred appellant to Dr. Vincent M. Fortanasce, a Board-certified neurologist and Dr. Glenn K. Takai, a Board-certified orthopedic surgeon, for impartial medical examinations and opinions regarding her continuing disability. By decision dated September 29, 1997, the Office terminated appellant's compensation effective that date based on the opinion of Dr. Fortanasce. By decisions dated November 5 and 25, 1997, the Office denied modification of its September 29, 1997 decision. In its November 5, 1997 decision, the Office first discussed the opinion of Dr. Takai and determined that the weight of the medical evidence continued to rest with the opinion of Dr. Fortanasce.

The Board notes that the Office properly determined that there was an unresolved conflict in the medical evidence and referred appellant, pursuant to section 8123(a) of the Act, to Dr. Fortanasce and Dr. Takai for impartial medical examinations and opinions regarding her continuing disability.<sup>6</sup> In a situation where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>7</sup> However, in a situation where the Office secures an opinion from an impartial medical examiner for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.<sup>8</sup>

In reports dated February 18, 24 and April 12, 1997, Dr. Fortanasce determined that appellant did not have any residuals of her June 9, 1990 employment injury. However, in his November 14, 1996 report, Dr. Takai determined that 25 percent of appellant's disability continued to be due to her June 9, 1990 employment injury and the remainder was due to her preexisting degenerative disc disease. The Office did not request that Dr. Takai clarify why he felt appellant continued to exhibit employment-related disability, particularly in light of the limited findings on examination and diagnostic testing.

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<sup>5</sup> In reports dated June 14 and August 14, 1995, Dr. Baumgard indicated that appellant did not have residuals of her June 9, 1990 employment injury and, in reports dated October 24, 1995 and March 20, 1996, Dr. Woods noted that appellant continued to have employment-related residuals.

<sup>6</sup> Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." 5 U.S.C. § 8123(a).

<sup>7</sup> *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

<sup>8</sup> *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232, 238 (1988); *Harold Travis*, 30 ECAB 1071, 1078 (1979).

Therefore, the opinion of one of the impartial medical examiners designated to resolve the conflict in the medical evidence is in need of clarification and elaboration. Because the Office did not meet its responsibility to seek a supplemental report from an impartial medical examiner, there is a continuing conflict in the medical evidence regarding whether appellant has continuing residuals of her June 9, 1990 employment injury. The Board notes that since the Office did not resolve the existing conflict, the Office has failed to meet its burden of proof in terminating appellant's benefits effective September 29, 1997.<sup>9</sup>

The decisions of the Office of Workers' Compensation Programs dated November 5 and 25 and September 29, 1997 are reversed.

Dated, Washington, D.C.  
August 24, 1999

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

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<sup>9</sup> See *Gail D. Painton*, 41 ECAB 492, 498 (1990); *Craig M. Crenshaw, Jr.*, 40 ECAB 919, 922-23 (1989).