U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

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In the Matter of HOWARD E. SMITH and U.S. POSTAL SERVICE,
POST OFFICE, San Diego, Calif.

*Docket No. 96-2399; Submitted on the Record;*
*Issued August 5, 1998*

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DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation effective May 23, 1995 on the grounds that he had no disability after that date due to his February 9, 1993 employment injury.

The Board has duly reviewed the case record in the present appeal and finds that the Office did not meet its burden of proof to terminate appellant's compensation effective May 23, 1995 on the grounds that he had no disability after that date due to his February 9, 1993 employment injury.

Under the Federal Employees' Compensation Act,[1] once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.[2] The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[3] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[4]

In the present case, the Office accepted that appellant sustained an employment-related inguinal strain on February 9, 1993 and appellant began working in a limited-duty position for the employing establishment shortly thereafter. By decision dated May 23, 1995, the Office terminated appellant's compensation, effective that date, based on the opinions of Dr. Jonathan A. Schleimer, a Board-certified neurologist to whom the Office referred appellant

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[1] 5 U.S.C. §§ 8101-8193.

[2] *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

[3] *Id.*

[4] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

for an impartial medical examination, and Dr. Emile A. Allen, a Board-certified urologist to whom Dr. Schleimer referred appellant for further evaluation. In reports dated in January 1995, Drs. Schleimer and Allen determined that appellant no longer had employment-related disability; the physicians indicated that appellant's problems were due to a nonwork-related varicocele condition.

The Office had referred appellant to Dr. Schleimer after it determined that there was a conflict in the medical evidence between Dr. Lawrence S. Pohl, a Board-certified family practitioner, and Dr. Frederick R. Martin, a Board-certified neurologist, regarding whether appellant continued to have residuals of his February 9, 1993 employment injury. The Office indicated that Dr. Pohl was an Office referral physician and Dr. Martin was an attending physician. 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] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.[6] In situations where the case is properly 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.[7]

The Board notes, however, that there was no conflict in the medical evidence when appellant was referred to Dr. Schleimer in that Dr. Pohl actually was an attending physician rather than an Office referral physician. Dr. Pohl began to treat appellant for his inguinal condition shortly after the February 9, 1993 employment injury and there is no evidence to show that appellant was referred to him by the Office. As noted above, there can only be a conflict in the medical evidence when there are opposing reports of an attending physician and a physician for the government. There was no such conflict in the present case prior to the May 23, 1995 termination of appellant's compensation and Drs. Schleimer and Allen actually served as Office referral physicians rather than impartial medical examiners. Consequently, there currently is an unresolved conflict in the medical evidence between Drs. Schleimer and Allen, on the one hand, and another of appellant's attending physicians, Dr. Martin, on the other hand. The Board notes that since the Office relied on the reports of Drs. Schleimer and Allen to terminate appellant's compensation benefits effective May 23, 1995 without having resolved the existing conflict, the Office has failed to meet its burden of proof in terminating appellant's benefits.[8]

[5] U.S.C. § 8123(a).

[6] *William C. Bush*, 40 ECAB 1064, 1975 (1989).

[7] *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

[8] *See Gail D. Painton*, 41 ECAB 492, 498 (1990); *Craig M. Crenshaw, Jr.*, 40 ECAB 919, 922-23 (1989).

The decision of the Office of Workers' Compensation Programs dated May 9, 1996 is reversed.

Dated, Washington, D.C.
August 5, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member