

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MARTIN BASS and U.S. POSTAL SERVICE, SANTA ANA  
MANAGEMENT DISTRICT, Santa Ana, Calif.

*Docket No. 95-2130; Submitted on the Record;  
Issued March 18, 1998*

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DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's disability compensation benefits.

The Board has duly reviewed the case record and concludes that the Office has not met its burden of proof in terminating appellant's disability compensation benefits.

On October 25, 1991 appellant, then a postal carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date, he injured his back and neck and experienced shooting pain in his arms, head and leg as a result of pushing a gurney out to his jeep. Appellant stopped work on October 28, 1991 until February 27, 1994. On February 28, 1994 appellant returned to work four hours per day in a light-duty capacity and continued to work until June 17, 1994, when he was admitted for the second time for detoxification of his vicodin addiction.<sup>1</sup> Appellant returned to work four hours per day on July 21, 1994.

The Office accepted appellant's claim for a lumbosacral strain, a cervicothoracic strain, a herniated disc at C6-7 and consequential injury of addiction to vicodin.

On August 23, 1994 the Office referred appellant along with a statement of accepted facts, medical records and a list of specific questions to Dr. Steven R. Graboff, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine whether appellant had any residuals from the October 25, 1991 employment-related injury. By letter of the same date, the Office advised Dr. Graboff of the referral. Dr. Graboff submitted a September 1, 1994 medical report, indicating that appellant did not have any residuals causally related to the October 25, 1991 employment injury.

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<sup>1</sup> Appellant was initially admitted for vicodin detoxification in December 1993.

By letter dated September 30, 1994, the Office requested that Dr. Ram Mudiyaam, a Board-certified orthopedic surgeon and appellant's treating physician, review Dr. Graboff's report and indicate whether he agreed with Dr. Graboff's findings. Dr. Mudiyaam did not respond. By letter dated October 31, 1994, the Office again requested that Dr. Mudiyaam review Dr. Graboff's report and indicate whether he agreed with his findings. In a November 10, 1994 letter, Dr. Mudiyaam disagreed with Dr. Graboff's finding that appellant did not have any residuals of the October 25, 1991 employment injury.

In a notice of proposed termination of compensation dated March 1, 1995, the Office advised appellant that it proposed to terminate his compensation, because the medical evidence of record failed to establish continued disability. The Office also advised appellant to submit additional medical evidence supportive of his continued disability within 30 days. In an accompanying memorandum, the claims examiner recommended termination of appellant's compensation, because the weight of the medical opinion evidence of record rested with Dr. Graboff's September 1, 1994 medical report.

The Office received Dr. Mudiyaam's September 12 and October 12, 1994 medical reports, and March 21 and 28, 1995 supplemental medical reports regarding appellant's complaints of neck and low back pain and appellant's ability to work.

By decision dated April 3, 1995, the Office terminated appellant's compensation benefits on the grounds that the medical evidence of record established that appellant no longer had any disability causally related to the October 25, 1991 employment injury. In an accompanying memorandum, the Office found that the weight of the medical opinion evidence rested with Dr. Graboff's medical report.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability has ceased or that it was no longer related to the employment.<sup>2</sup>

In a September 1, 1994 medical report, Dr. Graboff indicated a history of the October 25, 1991 employment injury, medical treatment, previous injuries and employment, and a review of the medical evidence. Dr. Graboff also indicated his findings on physical examination. Dr. Graboff diagnosed multilevel cervical degenerative spondylosis, multilevel lumbar degenerative spondylosis, and a history of chymopapain injection for lumbar disc disease preexistent to the October 25, 1991 employment injury. Dr. Graboff also diagnosed musculoligamentous strain of the cervical spine and lumbar spine due to the October 25, 1991 employment injury superimposed on preexistent chronic lumbar and cervical multilevel degenerative disc and joint disease, as well as spinal stenosis at L3-4 and L4-5 and a history of substance abuse. Dr. Graboff opined that appellant did not have any residuals causally related to the October 25, 1991 employment injury, that appellant became permanent and stationary regarding the October 25, 1991 employment injury as of November 11, 1992, that appellant could return to his usual work with no physical restrictions and that appellant did not require

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<sup>2</sup> Jason C. Armstrong, 40 ECAB 907 (1989).

future medical treatment or vocational rehabilitation services. Dr. Graboff's report was accompanied by a completed work evaluation restrictions form indicating appellant had no physical restrictions and that he could work eight hours per day.

In medical reports dated September 12 and October 12, 1994, in a November 10, 1994 letter and a March 21, 1995 supplemental medical report, Dr. Mudiyam opined that appellant could work four hours per day, but that functional testing was necessary to determine appellant's work status as well as the number of hours that appellant could actually work and to determine appellant's physical restrictions. In the November 10, 1994 letter and March 21, 1995 supplemental medical report, Dr. Mudiyam stated that it was difficult to conclusively state whether appellant's degenerative conditions were only temporarily aggravated by the October 25, 1991 injury. In a March 28, 1995 supplemental medical report, Dr. Mudiyam stated that appellant could not return to his usual employment as a letter carrier and that appellant was restricted to sitting intermittently for approximately 4 hours per day, engaging in walking activities for 3 hours per day, lifting intermittently no more than 15 to 20 pounds, and standing intermittently for 1 to 2 hours per day. Dr. Mudiyam further stated that appellant should refrain from repetitive bending, stooping, twisting, kneeling and squatting activities.

Section 8123(a) of the Federal Employees' Compensation Act provides that "[I]f there is a 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."<sup>3</sup>

In view of the discrepancy between the opinion of Dr. Graboff, a second opinion physician and Dr. Mudiyam, appellant's treating physician, regarding the nature of the aggravation of residuals of the October 25, 1991 employment injury, the number of hours that appellant can work and appellant's physical restrictions, the Board finds that there is a conflict in the medical opinion evidence. Therefore, the Office has not met its burden of proof in terminating appellant's disability compensation benefits.<sup>4</sup>

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<sup>3</sup> 5 U.S.C. § 8123(a).

<sup>4</sup> The Board notes that subsequent to its April 3, 1995 decision, the Office received Dr. Mudiyam's March 21, 1995 report on April 5, 1995 and Dr. Mudiyam's March 28, 1995 report on April 7, 1995. The Board is precluded from considering evidence not before the Office at the time of the final decision. 20 C.F.R. § 501.2(c).

The April 3, 1995 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, D.C.  
March 18, 1998

Willie T.C. Thomas  
Alternate Member

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member