

U. S. DEPARTMENT OF LABOR
Employees' Compensation Appeals Board

In the Matter of [REDACTED] and DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION, JFK INTERNATIONAL AIRPORT,
Jamaica, N.Y.

*Docket No. 95-2305; Submitted on the Record;
Issued September 17, 1996*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation, effective January 3, 1995, on the grounds that she had no condition or disability due to her November 4, 1993 employment injury after that date.

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 January 3, 1995, on the grounds that she had no condition or disability due to her November 4, 1993 employment injury after that date.

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 cervical sprain and lumbar sprain on November 4, 1993, due to twisting her back after catching her blazer on a trash container, and paid compensation for total disability. The Office properly determined that there was a conflict in the medical opinion between Dr. Seymour Einhorn, appellant's attending Board-certified orthopedic surgeon, and Dr. John C. Killian, a Board-certified orthopedic surgeon acting as an Office referral physician, on the extent of appellant's continuing

¹ 5 U.S.C. § 8101 *et seq.*

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).

condition or disability due to her November 4, 1993 employment injury.⁵ In order to resolve the conflict, the Office referred appellant to Dr. Joseph S. Mulle, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter.⁶ By decision dated January 3, 1995, the Office terminated appellant's compensation, effective that date, based on the opinion of Dr. Mulle and, by decision dated May 23, 1995, it denied modification of its January 3, 1995 decision.

In situations 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.⁷ The Board has carefully reviewed the opinion of Dr. Mulle and notes that it does not have sufficient probative value, regarding the relevant issue of the present case, to be granted such special weight.

Dr. Mulle's opinion, as contained in his September 23, 1994 report, is of diminished probative value because it is not based on a complete and accurate factual and medical history and does not contain adequate medical rationale, with respect to whether appellant continued to have cervical or back residuals of her November 4, 1993 employment injury.⁸ Dr. Mulle did not provide any notable discussion of appellant's medical treatment or diagnostic testing, and it is unclear from the record whether he engaged in an adequate review of the medical history pertaining to her cervical and back conditions.⁹ He indicated that appellant had not sustained any injury to her neck prior to November 4, 1994, but in fact there is evidence of record which shows that appellant sustained injury to her neck in January 1991. As part of his opinion, Dr. Mulle was asked to evaluate whether appellant had any continuing cervical condition or disability due to her November 4, 1993 employment injury, but the findings of his September 23, 1994 report do not indicate that he engaged in such an evaluation of appellant's cervical condition. Dr. Mulle concluded that appellant had made a "satisfactory recovery" from the back injury she sustained on November 4, 1993, but he did not provide adequate medical rationale in support of this conclusion.¹⁰ He did not describe the nature of appellant's November 4, 1993 employment injury in any detail and explain why this injury would

⁵ In various reports, dated in mid to late 1994, Dr. Einhorn noted that appellant's employment-related cervical and back conditions continued to cause total disability. In contrast, Dr. Killian indicated in a June 23, 1994 report that appellant's employment-related cervical condition had completely resolved and that she had some residuals of her employment-related back condition which caused minimal partial disability.

⁶ 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).

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

⁸ See *Donna Faye Cardwell*, 41 ECAB 730, 741-42 (1990); *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

⁹ For example, although Dr. Mulle made brief reference to an attending physician's interpretation of x-rays obtained in November 1993, he did not provide his own evaluation of appellant's diagnostic testing and it is unclear whether he reviewed the actual findings of such testing.

¹⁰ See *Leon Harris Ford*, 31 ECAB 514, 518 (1980) (finding that a medical report is of limited probative value on a medical issue if it contains a conclusion which is unsupported by medical rationale).

have resolved or indicate what condition would have been responsible for appellant's continuing medical problems.¹¹

Given the limited probative value of Dr. Mulle's opinion, there continues to be a conflict in the medical evidence on whether appellant has a continuing condition or disability due to her November 4, 1993 employment injury. The Board notes that, since the Office relied on the opinion of Dr. Mulle to terminate appellant's compensation benefits effective January 3, 1995, without having resolved the existing conflict, the Office failed to meet its burden of proof in terminating appellant's compensation.¹²

The decisions of the Office of Workers' Compensation Programs dated May 23 and January 3, 1995 are reversed.

Dated, Washington, D.C.
September 17, 1996

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

¹¹ Dr. Mulle indicated that appellant exhibited no objective findings, but he did not discuss this assertion in light of other contemporaneous medical evidence which showed that she exhibited examination findings such as spasms and trigger points in the cervical and back areas.

¹² See *Gail D. Painton*, 41 ECAB 492, 498 (1990); *Craig M. Crenshaw, Jr.*, 40 ECAB 919, 922-23 (1989).