

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ZEYNEP KIZILATES and U.S. POSTAL SERVICE,
POST OFFICE, Staten Island, NY

*Docket No. 98-1265; Submitted on the Record;
Issued February 16, 2000*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation benefits effective December 25, 1996 on the grounds that her employment injury had resolved.

On November 15, 1995 appellant, then a 29-year-old letter carrier, sustained a herniated disc in the performance of duty.

In a form report dated December 28, 1995, Dr. Zeki A. Uygur, appellant's attending neurosurgeon, diagnosed a herniated disc at L2-3 based upon the magnetic resonance imaging (MRI) scan and indicated that appellant was totally disabled.

In a narrative report dated February 16, 1996, Dr. Pioneer E. Atakent, a Board-certified physiatrist and the chairperson of the Department of Rehabilitation Medicine at the Long Island College Hospital, provided a history of appellant's condition and related her complaints of back pain, mainly on the left side, which radiated to her left leg. He diagnosed low back pain and a herniated disc at L2-3.

By letter dated February 21, 1996, the Office advised appellant that she had been placed on the periodic compensation roll effective January 27, 1996 to receive compensation benefits for temporary total disability.

In a narrative report dated April 3, 1996, Dr. Uygur related that appellant had been under his care since November 1995 for complaints of low back pain radiating into the left leg due to her employment injury. He stated that he had diagnosed a herniated disc at L2-3 based upon clinical findings and an MRI scan. Dr. Uygur stated that he last examined appellant on March 28, 1996, related her complaints of low back pain with radiation into the left leg and opined that she was totally disabled.

In a narrative report dated April 23, 1996, Dr. Atakent stated that an electromyogram of appellant's left lower extremity performed on April 15, 1996 "showed [two] positive sharp waves in left vastus med, [one] positive sharp wave in left hamstring, [three] [to] [four] positive sharp waves over left L3-4 paraspinal muscles" and that the findings were compatible with a diagnosis of left L3-4 radiculopathy.

In a report dated May 29, 1996, Dr. Uygur related that he saw appellant on May 24, 1996 at which time she was still complaining of low back and leg pain. He provided findings on examination and indicated that appellant was still totally disabled.

By letter dated October 11, 1996, the Office referred appellant to Dr. Irwin J. Nelson, a Board-certified orthopedic surgeon, for an examination and evaluation as to whether appellant had any remaining disability or medical condition causally related to her November 14, 1996 employment injury.

In a report dated November 14, 1996, Dr. Nelson provided a history of appellant's medical condition, course of treatment and findings on physical examination. He stated that appellant had subjective complaints but no objective findings. Dr. Nelson stated that he "was aware" that appellant had an MRI scan dated December 15, 1995, which showed an essentially bulged disc at L2-3. He stated that appellant had a normal neck, back, upper and lower extremity examination with both fine and gross manipulation of the hands. Dr. Nelson stated that there was no muscle weakness, measurable atrophy or reflux changes. He provided findings on examination and stated:

"It is a well-known fact that a bulged disc on MRI [scan] is of no significance unless associated with objective clinical findings of which [appellant] has none. She is able to sit on the plinth with her legs extended to 90 degrees. She has been receiving physical therapy for one year. It is my opinion she has received the maximum benefit of heat treatments and physical therapy. It is also my opinion [appellant] has no orthopedic impairment or physical disability at this time. I suggest [appellant] also have a neurosurgical consultation. Since there are no objective findings, it is my opinion [appellant] can return to work as a letter carrier and driver performing all of her normal duties."

By letter dated November 22, 1996, the Office advised appellant that it proposed to terminate her compensation benefits on the grounds that Dr. Nelson's November 14, 1996 report established that her work-related herniated disc had resolved and there was no objective evidence of disability.

By decision dated December 24, 1996, the Office terminated appellant's compensation benefits effective December 25, 1996.

On September 8, 1997 appellant, through her representative, requested reconsideration of the termination of her compensation benefits and submitted additional medical evidence.

In a letter dated January 24, 1997, Dr. Uygur, related that he had examined appellant on January 23, 1997 at which time she was still complaining of low back pain radiating into the left

leg. He provided findings on examination which included limited spine motion and he requested authorization for an MRI scan to compare with a previous MRI scan performed on December 19, 1995. Dr. Uygur stated that appellant could resume work for four hours a day but not in her regular position.

In a report dated January 28, 1997, Dr. Uygur provided a history of his course of treatment of appellant and stated that he had diagnosed post-traumatic low back derangement secondary to a herniated intervertebral disc at L2-3 resulting in lumbosacral radiculopathy. Dr. Uygur stated his opinion that appellant's condition was the result of her November 1995 employment injury. He stated that appellant had been totally disabled between November 15, 1995 and January 23, 1997 and, as of January 23, 1997, he had recommended that appellant could resume work with the limitations of bending, lifting, carrying heavy objects, sitting and standing without intervals. In reference to Dr. Nelson's report, he noted that Dr. Nelson had recommended neurosurgical consultation but did not seem to be aware of the fact that he, Dr. Uygur, was a neurosurgeon. He also noted that Dr. Nelson had stated incorrectly that appellant's accepted condition was a bulging disc rather than a herniated disc.

By decision dated December 15, 1997, the Office denied modification of its December 24, 1996 decision.

The Board finds that the Office has not met its burden of proof in terminating appellant's compensation benefits due to an unresolved conflict in the medical opinion evidence.

It is well established that 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 is no longer related to the employment.¹

Section 8123(a) of the Federal Employees' Compensation Act provides, in pertinent part, "If there is disagreement between the physician making the examination of the United States evidence that physician of the employee, the Secretary shall appoint a third physician who shall make an examination."²

In this case, the Office, by its decision dated December 24, 1996, terminated appellant's compensation benefits effective December 25, 1996 based upon the November 14, 1996 report of Dr. Nelson, a Board-certified orthopedic surgeon and an Office referral physician.

¹ See *Alfonso G. Montoya*, 44 ECAB 193, 198 (1992); *Gail D. Painton*, 41 ECAB 492, 498 (1990).

² 5 U.S.C. § 8123(a).

In his report dated November 14, 1996, Dr. Nelson provided a history of appellant's medical condition, course of treatment and findings on physical examination. He stated that appellant had a normal neck, back, upper and lower extremity examination with both fine and gross manipulation of the hands and no muscle weakness, measurable atrophy or reflux changes. Dr. Nelson provided findings on examination and stated:

“It is a well-known fact that a bulged disc on MRI [scan] is of no significance unless associated with objective clinical findings of which [appellant] has none. She is able to sit on the plinth with her legs extended to 90 degrees. She has been receiving physical therapy for one year. It is my opinion she has received the maximum benefit of heat treatments and physical therapy. It is also my opinion [appellant] has no orthopedic impairment or physical disability at this time.... Since there are no objective findings, it is my opinion [appellant] can return to work as a letter carrier and driver performing all of her normal duties.”

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resume work with the limitations of bending, lifting, carrying heavy objects, sitting and standing without intervals.

The Board finds that there exists an unresolved conflict in the medical opinion evidence between Drs. Uygur and Atakent, appellant's physicians and Dr. Nelson, the Office referral physician, as to whether appellant's employment injury had resolved as of December 25, 1996, the date the Office terminated her compensation benefits. Therefore, the Office did not meet its burden of proof in terminating appellant's compensation benefits.

The decision of the Office of Workers' Compensation Programs dated December 15, 1997 is reversed.

Dated, Washington, D.C.
February 16, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member