U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOAN A. POSA and U.S. POSTAL SERVICE,
POST OFFICE, Pittsburgh, PA

Docket No. 99-542; Submitted on the Record;
Issued February 7, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits effective May 25, 1997 on the grounds that her work-related disability had ceased on or before that date.

On January 27, 1988 appellant, then a 29-year-old letter sorting machine clerk, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that she aggravated a preexisting back injury on October 18, 1987 while lifting trays of mail. The Office accepted the claim for aggravation of a preexisting herniated disc on December 21, 1990. Appellant stopped work on October 18, 1987 and has not returned to work. The Office placed appellant on the periodic rolls on October 16, 1991.

In reports dated June 24 and July 31, 1992, March 22, 1994 and April 1, 1995, Dr. Leonard Merkow, an attending Board-certified anatomic and clinical pathologist, opined that appellant was totally disabled from performing her usual employment or any other type of work.

On July 15, 1992 the Office referred appellant to Dr. Patrick Laing, a Board-certified orthopedic surgeon, for a second opinion. In a report dated August 7, 1992, he opined that appellant had recovered from the aggravation of her herniated disc and could be expected to return to full work within two to three months. In response to the Office's request for clarification, Dr. Laing indicated that appellant had made a complete recovery and that there were no objective evidence that she continued to suffer from residuals of her alleged injury.

The Office referred appellant to Dr. Andrew D. Kranik, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict in the medical evidence between Dr. Merkow, appellant's attending physician, who opined that appellant was totally disabled and Dr. Laing, a second opinion physician, who opined that appellant's aggravation of her preexisting herniated disc had resolved. In a report dated December 20, 1994, Dr. Kranik opined that appellant could return to her job, but first in a light-duty capacity working four hours

per day and gradually working up to eight hours. Dr. Kranik noted that appellant had been treated at Allegheny General Hospital and St. Margaret's Hospital in 1985 for herniated discs and whiplash. He opined that appellant had not reached maximum medical improvement at that time.

By letter dated April 7, 1995, the Office requested Dr. Kranik to state when appellant had reached preinjury level and indicated that her reports from the two hospitals he mentioned in his report would be forwarded for his review and comment.

In a letter dated May 19, 1995, the Office advised Dr. Kranik that he had not responded to the Office's April 7, 1995 letter.

The Office referred appellant to Dr. W. Scott Nettrour, a Board-certified orthopedic surgeon, for a second impartial medical examination to resolve the conflict in the medical evidence between Dr. Merkow, appellant's attending physician, who opined that appellant was totally disabled and Dr. Laing, a second opinion physician, who opined that appellant's aggravation of her preexisting herniated disc had resolved as Dr. Kranik had not responded to the Office's request for further information.

In a report dated May 21, 1996, Dr. Nettrour, based upon a history of appellant's employment injury, a review of the records, physical examination, statement of accepted facts, and objective tests, opined that "[t]here is nothing in this evaluation to preclude [appellant's] return to any type of sedentary or light laboring or moderate laboring activities." He also opined that there was no evidence to support that appellant had any impairment of her lumbar spine and that it was unlikely that appellant would "require significant medical care in the future."

By letter dated January 8, 1997, the Office requested Dr. Nettrour to complete a work restriction evaluation form. In a work restriction evaluation form dated February 19, 1997, Dr. Nettrour indicated that appellant had reached maximum medical improvement, was capable of working eight hours per day and could "return to sedentary or light laboring or moderate laboring activities."

On March 6, 1997 the Office issued a proposed notice of termination of compensation advising appellant that it proposed to terminate her wage-loss compensation benefits as her work-related injury had resolved and the disability resulting from her injury had ceased. Appellant was advised that if she disagreed with the proposed termination of benefits she should submit additional evidence within 30 days.

By decision dated May 20, 1997, the Office terminated appellant's wage-loss compensation and medical benefits effective May 27, 1997 as the medical evidence of record established that appellant had recovered from an aggravation of a herniated disc at L5-S1. The Office found that the weight of the medical evidence rested with Dr. Nettrour as the impartial medical examiner, who opined that the residuals of appellant's injury should have resolved in three to six weeks, and that appellant was capable of working an eight-hour day.

On February 5, 1998 appellant, through counsel, requested reconsideration of the May 20, 1997 decision terminating benefits. In support of her request, appellant submitted reports from Dr. Kranik, her new treating physician, dated August 8 and November 8, 1997.

In an August 8, 1997 report, Dr. Kranik noted that the electromyography and nerve conduction studies performed on March 27, 1997 showed chronic nerve damage at L4-5 and L5-S1 which was consistent with appellant's subjective complaints and the magnetic resonance imaging tests. The physician diagnosed lumbosacral sprain/strain syndrome, lumbosacral radiculitis and lumbosacral radiculopathy. Dr. Kranik stated that appellant's radiculopathy had not resolved and opined that appellant was capable of performing light-duty work.

In a November 18, 1997 report, Dr. Kranik opined that appellant in an eight-hour per day provided she was not to sit continuously for 30 minutes, not lift anything above 10 pounds, occasionally bend forward, occasionally squat and occasionally crawl. Dr. Kranik opined, however, that at the present time appellant could work part time four hours per day five days per week performing light-duty work.

By merit decision dated May 11, 1998, the Office denied appellant's request for reconsideration as the medical evidence submitted failed to support that appellant continued to have any disability due to her accepted employment injury.

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits effective May 25, 1997 on the grounds that her work-related disability had ceased on or before that date.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[1] After it has been determined than an employee has disability causally related to his or her employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.[2] It was the Office's burden of proof to establish that appellant's condition had ceased. It was appellant's burden of proof, however, to establish that any subsequently diagnosed conditions are causally related to the accepted employment injury.

Section 8123(a) of the Federal Employees' Compensation Act provides in 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."[3]

The Office found that a conflict in the medical opinion existed between Dr. Merkow, appellant's attending physician, and Dr. Laing, the second opinion physician and referred appellant to Dr. Kranik who opined that appellant could initially return to his job working four

[1] *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[2] *Warren L. Divers*, 47 ECAB 574 (1996); *Frank J. Mela, Jr.*, 41 ECAB 115 (1989).

[3] 5 U.S.C. § 8123(a).

hours per day and working up to working eight hours per day. The Office requested Dr. Kranik to indicate when he thought appellant could return to full-time work, but received no response to the inquiry.

When the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from the specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report. When the impartial medical specialist's statement of clarification or elaboration is not forthcoming or if the specialist is unable to clarify or elaborate on the original report of if the specialist's supplemental report is also vague, speculative or lacks rationale, the Office must submit the case record together with a detailed statement of accepted facts to a second impartial specialist for a rationalized medical opinion on the issue in question.[4] Unless this procedure is carried out by the Office, the intent of 5 U.S.C. § 8123(a) will be circumvented when the impartial medical specialist's report is insufficient to resolve the conflict of medical evidence.[5]

The Board has held that in a situation where the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from such specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report.[6] If that supplemental report is not forthcoming or if it fails to clarify the ambiguities of the original report, referral to a second impartial examiner is required.[7] Such is the situation in the instant case.

As Dr. Kranik had not replied to the Office's request for clarification as to when appellant could return to her job full time, the Office referred appellant to Dr. Nettrour for a second impartial medical examination.

The Office referred appellant to Dr. Nettrour for a second impartial medical evaluation to resolve the conflict in the medical opinion evidence. The Board concludes that Dr. Nettrour's May 21, 1996 report and are not sufficiently well rationalized to constitute the weight of the medical opinion evidence. In his May 21, 1996 report, he opined that appellant had "no functional impairment in use of her lumbar back or right leg. Dr. Nettrour concluded that appellant's complaints were "not well supported by hard physical findings on examination." Lastly, he did not give an opinion as to whether appellant was capable of performing her date-of-injury position or whether the residuals from her employment injury had ceased. Dr. Nettrour's explanation is insufficient to rule out that appellant has residuals of the conditions diagnosed by appellant's treating physicians as causally related to the accepted employment injury.

[4] *See Nathan L. Harrell*, 41 ECAB 402 (1990).

[5] *Harold Travis*, 30 ECAB 1071 (1979).

[6] *Id.*

[7] *Margaret M. Gilmore*, 47 ECAB 718 (1996).

Furthermore, Dr. Kranik's opinion, as appellant's treating physician, conflict with Dr. Nettrour's opinion.

Because a conflict in medical opinion exists concerning whether appellant continued to have residual disability due to her accepted employment injury or whether she was capable of performing her date-of-injury position, the Board finds that the weight of the medical evidence fails to establish that appellant's work-related disability had ceased. For this reason, the Office improperly invoked the penalty provision of 5 U.S.C. § 8106(c)(2). The Board will, therefore, reverse the Office's May 21, 1998 decision affirming the termination of her benefits.

The decision of the Office of Workers' Compensation Programs dated May 11, 1998 is reversed.

Dated, Washington, D.C.
February 7, 2000

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member