

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BARBARA J. WARREN and U.S. POSTAL SERVICE,
POST OFFICE, Redford, MI

*Docket No. 00-111; Submitted on the Record;
Issued March 28, 2000*

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 on July 22, 1999.

This case has a complex procedural history. On July 20, 1993 appellant, then a 51-year-old letter carrier, sustained an employment-related lumbar strain and temporary aggravation of spondylolisthesis. She stopped work that day and returned to a limited-duty, full-time position in August 1994. The Office continued to develop the claim and on September 27, 1997 referred her to Dr. Philip J. Mayer, a Board-certified orthopedic surgeon, for a second-opinion evaluation. Finding that a conflict in the medical evidence had been created between appellant's treating physicians, Drs. Kevin Foley and Lanore P. Najjar and Dr. Mayer, the Office referred her to Dr. Glafkos Theodoulou for an impartial medical evaluation. By letter dated May 8, 1996, the Office informed appellant that it proposed to terminate her compensation, based on his opinion. By letter dated April 29, 1997, the Office informed appellant that Dr. Theodoulou's reports had been excluded because he had performed fitness-for-duty examinations for the employing establishment. Appellant was then referred to Dr. E. Michael Krieg, an orthopedic surgeon, for an impartial examination. By letter dated June 18, 1997, the Office informed appellant that it proposed to terminate her compensation, based on the opinion of Dr. Krieg and by decision dated October 15, 1997, the Office finalized the termination on the grounds that she had no residuals of the July 20, 1993 employment injury. Appellant stopped work on October 21, 1997 when her limited duty ceased.

Appellant timely requested a hearing that was held on May 12, 1998. In a July 10, 1998 decision, an Office hearing representative reversed the October 15, 1997 decision, finding that the Office failed to inform Dr. Krieg that he was to exclude Dr. Theodoulou's reports. As Dr. Krieg's report was tainted, it too was to be excluded. Appellant then began filing forms CA-7 and CA-8 claims for compensation and she was placed on wage-loss compensation. By letter dated August 10, 1998, the Office referred appellant to Dr. Richard C. Reilly, a Board-certified

orthopedic surgeon, for an impartial evaluation¹ and by letter dated September 17, 1998 informed appellant that it proposed to terminate her compensation, based on the opinion of Dr. Reilly. In an October 19, 1998 decision, the Office terminated appellant's compensation benefits.

Appellant again requested a hearing and, in a March 22, 1999 decision, an Office hearing representative remanded the case to the Office to determine if Dr. Reilly disregarded the excluded reports and, if so, he was to provide a specific, rationalized response regarding whether appellant's aggravation of spondylolisthesis had ceased by August 27, 1998 when he examined appellant and whether there was objective evidence of a continuing employment-related lumbar strain. By letter dated April 21, 1999, the Office requested that Dr. Reilly provide a supplementary report. In an April 28, 1999 letter, appellant's representative questioned whether Dr. Reilly should be excluded as an impartial examiner and, in a May 3, 1999 response, the Office informed appellant's representative that there was no need to exclude Dr. Reilly. Dr. Reilly provided a supplementary report dated May 13, 1999 and, by letter dated June 15, 1999, the Office informed appellant that it proposed to terminate her compensation, based on the opinion of Dr. Reilly. Hearing nothing further from appellant, in a decision dated July 21, 1999 and finalized July 22, 1999, the Office terminated her compensation benefits. The instant appeal follows.

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits.

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 or her employment, the Office may not terminate compensation without establishing that the disability has ceased or that it was no longer related to the employment.² Furthermore, in situations where there are 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 on a proper factual background, must be given special weight.³

On appeal appellant, through her representative, requested that the Board carefully review the reports of Dr. Reilly to ensure that the excluded physicians, Drs. Theodoulou and Krieg, had no influence on his opinion and also because Dr. Reilly had made himself available for performance of fitness-for-duty examinations at the employing establishment at the time he was performing the impartial examination on appellant.

The relevant medical evidence includes Dr. Reilly's August 27, 1998 report in which he advised that, while appellant had degenerative spondylolisthesis, it was unrelated to the work

¹ Drs. Mayer, Theodoulou, Krieg and Reilly were provided with the medical record, a statement of accepted facts and a set of questions.

² See *Patricia A. Keller*, 45 ECAB 278 (1993).

³ See *Kathryn Haggerty*, 45 ECAB 383 (1994); *Edward E. Wright*, 43 ECAB 702 (1992).

incident. He stated that there were no objective physical findings to support that residuals remained “solely” due to the 1993 employment injury and concluded that she could work eight hours a day with restrictions on bending and lifting. In a May 13, 1999 report, Dr. Reilly stated that he had not based any of his conclusions on the reports of Drs. Theodoulou or Krieg. He stated:

“On the basis of my evaluation, I felt [appellant] had a spondylolisthesis in the lower lumbar spine. It was further my opinion that this was congenital and was temporarily aggravated by the injury in 1993. It was my opinion in August 1998 that there had been an aggravation of a preexisting condition. Based on lack of objective findings during the evaluation, it was my opinion that the injury had resolved by the time of my evaluation in August 1998. Because of the basic underlying condition, I felt [appellant] should be limited in a job situation requiring repetitive bending and lifting. In my opinion, these restrictions are on the basis of the underlying preexisting condition and not related to the incident of 1993. It is further my opinion that any aggravation caused by her lifting incident of July 1993 had resolved and was not related to her condition at that time. That is to say, I did not find a relationship between her lifting injury [of] 1993 and the condition for which I saw her in August 1998. I felt [appellant] had a long-standing spondylolisthesis of the lumbar spine, which would account for variable pain in the lower back. It was my opinion that an injury at work did not contribute to her medical condition, that is, the spondylolisthesis.”

Appellant’s treating osteopathic internist, Dr. Najjar, provided a number of duty status reports, with the most recent being a report dated October 2, 1997, in which she diagnosed lumbar spasm and advised that appellant could work with restrictions. In a form report dated April 2, 1998, Dr. Najjar diagnosed lumbar spine spondylolisthesis and spinal stenosis, advised that appellant could not carry mail and provided lifting restrictions.⁴

Regarding appellant’s contention that Dr. Reilly’s reports should be excluded, the Office is only required to exclude medical reports in four cases: (1) where the impartial physician is regularly involved in fitness-for-duty examinations for the employing establishment; (2) where a second impartial physician’s report is requested before clarification of an initial report; (3) where the Office has had telephone contact with the physician; and (4) where leading questions have been posed to the physician.⁵ In this case, appellant offered copies of two letters⁶ that included Dr. Reilly’s name on a list of five physicians who qualified under an employing establishment union agreement to make a final determination regarding an employee’s health status. Appellant’s representative conceded that he had no evidence that Dr. Reilly had performed fitness-for-duty examinations for the employing establishment. The Board therefore finds the evidence submitted insufficient to establish that Dr. Reilly had a relationship with the

⁴ Appellant also submitted reports that were titled “unverified office note” and an unsigned report from the Orthopedic Center for Athletic Medicine of Henry Ford Hospital dated May 15, 1998.

⁵ *Samuel Theriault*, 45 ECAB 586 (1994).

⁶ These letters do not pertain to appellant.

employing establishment that would serve to disqualify him from providing an impartial evaluation in this case. Likewise, he clearly stated that he had not based any of his conclusions on the reports of Drs. Theodoulou or Krieg.

Thus, while appellant submitted additional reports from Dr. Najar, she merely reiterated her findings regarding appellant's condition and indicated on an Office form report that the condition was employment related. As she had been on one side of the conflict in the medical opinion that Dr. Reilly resolved, Dr. Najar's reports are insufficient to overcome the special weight accorded Dr. Reilly.⁷ The Board, therefore, finds that appellant had no employment-related disability on or after July 22, 1999 and the Office met its burden of proof to terminate her compensation benefits on that date.

The decision of the Office of Workers' Compensation Programs dated July 21, 1999 and finalized July 22, 1999 is hereby affirmed.

Dated, Washington, D.C.
March 28, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

⁷ See *Harrison Combs, Jr.*, 45 ECAB 716 (1994).