

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ARLENE MOSBERG and U.S. POSTAL SERVICE,
POST OFFICE, Cleveland, OH

*Docket No. 00-1239; Submitted on the Record;
Issued July 23, 2001*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective June 26, 1998; and (2) whether the Office properly denied appellant's request for reconsideration on the merits under 5 U.S.C. § 8128.

On December 11, 1981 appellant, then a 42-year-old letter carrier, was injured in the performance of duty when she slipped off an icy porch while delivering the mail. The record indicates that she was unconscious for a short period of time and was taken to the emergency room at Lakewood Hospital where she had x-rays of the spine, left elbow and left knee. The x-rays were read as negative so she was released with a diagnosis of contusion/strain of the neck and back as well as contusion/strain of the left elbow and left knee. The Office accepted appellant's traumatic injury claim for contusions and bruises of the neck, back and legs. She was off work from December 11, 1981 to June 23, 1983, when she returned to light duty for four hours per day. Appellant was subsequently terminated from her position on July 6, 1984, when the employing establishment was no longer able to accommodate her medical restrictions. She has not worked since July 6, 1984 and was placed on the periodic rolls.

Appellant underwent a magnetic resonance imaging (MRI) scan of the lumbar spine taken on November 6, 1990 that revealed disc degeneration and degenerative changes at L3-4 and L5-S1.

In an October 1, 1991 report, Dr. R. Geoffrey Wilber, a Board-certified orthopedist, advised that appellant was under his care for continuing problems with her lumbar spine, including degenerative disc disease, which left appellant totally disabled from work. He noted that surgical intervention might be indicated in the future.

In a report dated September 14, 1995, Dr. Wilber noted that appellant had marked back pain and leg pain without specific radiculopathy. He reported that appellant was markedly overweight and that she continued to have mechanical back pain in spite of conservative

treatment. Dr. Wilber diagnosed multilevel degenerative disc disease and stated that appellant's condition appeared to be related to morbid obesity in combination with her fall at work in 1981 "with recurrent exacerbations over time."

An MRI scan performed on July 19, 1996 showed evidence of moderately severe spinal stenosis at L4-5. It was noted that this condition was "the result of anterolisthesis of L4 on L5 and resultant pseudo-disc formation as well as significant degenerative changes of the facets."

In a work evaluation form dated November 22, 1996, Dr. John A. Davis, a family practitioner, opined that appellant was capable of working four hours per day and increasing her time to six hours per day at two-week intervals. He listed appellant's work restrictions as standing for 2 hours per day, intermittent sitting and walking for 2 hours per day and lifting between 10 to 20 pounds, with no bending, kneeling or twisting.

In a January 29, 1997 letter, the Office asked Dr. Davis to offer an opinion as to whether appellant was disabled due to her accepted contusions and whether she continued to experience any residuals of her December 11, 1981 work injury.

On February 11, 1997 the Office referred appellant to a rehabilitation counselor to facilitate her return to work.

In a treatment note dated February 26, 1997, Dr. Davis stated:

"[Appellant] returns for follow[-]up clinic evaluation. Her initial complaint is that I filled out a form that suggested that she return to work. [Appellant] states that she has not been back to work since 1984 due to a back condition and has been maintained off of work since that time. At her last appointment I suggested that she get a possible myelogram of her lumbar scan with a CT [computerized tomography] scan which she did not want to do. Currently the form I filled out suggested minimal activity, which would involve some sitting, standing and possible handwork. Since [appellant] works for the [employing establishment] she certainly might be able to sort mail. I do n[o]t know what this involves but she wants me to talk to her attorney about this and possibly change her form so that she can continue to be off of work."

On March 12, 1997 the employing establishment offered appellant a job as a part-time distribution clerk (modified), for eight hours a day, six days a week.

In a series of summary contacts made by the rehabilitation counselor, it was noted that Dr. Davis had not approved appellant for a return to work for eight hours per day; therefore, the employing establishment would have to issue a new job offer.

In a May 8, 1997 report, Dr. Davis related that appellant did not wish to return to work and that she refused to undergo surgery to alleviate her back symptoms. He advised that appellant was being referred to Dr. David T. Yu, a Board-certified physician in physical medicine and rehabilitation, for pain management.

On June 3, 1997 the employing establishment offered appellant a limited-duty job as a part-time flexible clerk, working only four hours per day, six days per week.

On June 4, 1997 the Office informed appellant that the position of a part-time flexible clerk was deemed to be suitable work. The Office advised appellant that she had 30 days to either accept the position or provide an explanation of her reasons for refusal of the offer; otherwise, she risked termination of her compensation.

On July 15, 1997 appellant came under the care of Dr. Yu. In a report dated August 5, 1997, he noted that appellant refused to undergo either surgery or epidural steroid injections for relief of her chronic back pain. Dr. Yu recommended that appellant undergo a progressive aerobic conditioning program before accepting the job offer of a flexible part-time clerk. He further requested that the Office provide him with a detailed job description "with emphasis on physical precautions and limitations" for the offered position.

In a status report dated August 26, 1997, an Office rehabilitation specialist noted that appellant was approved for eight weeks of work conditioning and a job analysis report had been prepared for Dr. Yu's approval.

The Office referred appellant to Dr. Vydiainga G. Raghavan, a Board-certified orthopedic surgeon, for a second opinion evaluation scheduled for October 1, 1997. In report dated October 10, 1997, he discussed appellant's work injury and medical history. Dr. Raghavan reported physical findings and related that appellant was distraught over health concerns with her husband and did not want to return to work since she needed to care for him. He further outlined pertinent medical records. Dr. Raghavan opined that appellant "does not have any residuals from the allowed conditions of contusion and bruises of neck back and legs." He stated that there is "no medical connection between [appellant's] current condition and the factors related to her employment injury." Dr. Raghavan concluded that appellant was totally disabled from her prior job and that she was unable to perform the work of a part-time flexible clerk based on nonemployment-related factors such as degenerative disc disease, spondylolisthesis at L4-5, spinal stenosis, exogenous obesity, chronic pain syndrome (symptom magnification and depressive disorder) and deconditioning.

In a September 19, 1997 report, Dr. Yu noted that appellant had agreed to electrodiagnostic testing and that she had been cleared by her cardiologist for a supervised conditioning program. He stated: "If the EMG [electromyogram] shows significant nerve injury, I feel that it would be reasonable to recommend that she does not return to work, however, if there is no evidence of nerve injury, she may require a conditioning period followed by a physical capacity evaluation to determine her ability to meet the job description as a postal worker which you forwarded to me."

In a report transmitted by facsimile copy on October 8, 1997, Dr. Yu indicated that appellant had severely restricted range of motion. He noted that appellant's symptoms were suggestive of lumbar spinal stenosis.

By letter dated October 29, 1997, the Office referred appellant along with a copy of the medical record and a statement of accepted facts to Dr. Richard Kaufman, a Board-certified orthopedic surgeon, for an impartial medical evaluation to be performed on November 10, 1997.

In a November 25, 1997 report, Dr. Kaufman noted appellant's history of work injury and her history of degenerative lumbar disc disease. After reporting physical findings, he rendered an impairment rating for the cervical spine. Dr. Kaufman stated that appellant's continuing problems associated with the lumbar spine were probably due to degenerative changes and not her work injury. He opined that appellant could work eight hours a day with a 20-pound lifting restriction and limited standing of no more than 2 hours per day. Dr. Kaufman further stated that appellant could perform the job of a modified/flexible distribution clerk "as described in the statement of facts submitted to me."

In a December 11, 1997 report, Dr. Yu noted that objective findings on EMG testing confirmed a diagnosis of lumbar spinal stenosis with concomitant neurological involvement in the lower limbs. He reviewed a copy of the job description and analysis for the part-time flexible clerk position as provided by the Office on October 27, 1997. Dr. Yu stated that appellant would not be able to carry a mail tray containing envelopes as it was stated that the tray could weigh more than 10 pounds and appellant was not capable of lifting more than 10 pounds. He indicated that "items on the lower shelves of the open case containing mail trays will require her to engage in repetitive bending at the lumbar spine" that is medically contraindicated. Dr. Yu further opined that an ergonomically designed chair for sitting activities would be required for appellant's back condition.

On January 6, 1998 the Office requested an addendum from Dr. Kaufman to clarify his opinion regarding the presence of any residuals of appellant's work injury. The Office provided Dr. Kaufman with a copy of the December 4, 1997 EMG report.

In a March 31, 1998 report, Dr. Kaufman indicated that appellant had "no objective finding of residual effects of the accepted injury of December 11, 1981." He then stated that it was his opinion that appellant "probably still has some residuals from the injury to her cervical spine as a result of the work injury." Dr. Kaufman opined that appellant was unable to return to her regular job due to her nonwork-related spinal stenosis and low back symptoms. He specifically stated that appellant's work limitations were not related to her neck.

On May 13, 1998 the Office issued a notice of proposed termination of compensation. In a memorandum attached to the notice, the Office advised that Dr. Kaufman's opinion established that appellant had no continuing disability related to an accepted medical condition caused by her work injury of December 11, 1988. The Office noted, however, that appellant may be disabled from gainful employment due to nonwork-related conditions such as spinal stenosis, degenerative disc disease, spondylolisthesis and exogenous obesity.

In a June 10, 1998 letter, appellant expressed her disagreement with the Office's proposal to terminate her compensation.

In a decision dated June 26, 1998, the Office terminated appellant's compensation effective June 26, 1998.

On June 24, 1999 appellant requested reconsideration and submitted a January 4, 1999 report from Dr. Yu, which discussed appellant's history of injury and treatment for chronic back pain. He diagnosed lumbar spinal stenosis and stated:

“[Appellant's] underlying condition has undoubtedly been present for a number of years and her symptoms were aggravated by the fall while working as a postal carrier in 1981. It is my opinion that she sustained a sprain/strain of the lumbar spine at that time, which made her symptoms worse. No fracture was seen on any of the studies that would suggest that the slippage on L4 on L5 was due to the fall on December 11, 1981.”

In a decision dated June 30, 1999, the Office denied modification following a merit review.

On August 11, 1999 appellant submitted additional medical evidence and requested reconsideration.

In conjunction with his reconsideration request, appellant submitted a June 16, 1999 report by Dr. Robert D. Zaas, a Board-certified orthopedic surgeon, who discussed appellant's medical history, work history, physical findings and symptoms. His diagnosis included sprain/strain of the cervical spine and lumbar spine; contusion to the head and back; substantial aggravation and acceleration of preexisting lumbar degenerative disc disease and osteoarthritis. Dr. Zaas opined that appellant's December 11, 1981 work injury aggravated a preexisting degenerative condition in her spine, which progressively worsened her spinal disability. He specifically noted that there had not been any intervening trauma. Dr. Zaas concluded that appellant was totally disabled as a result of her spine condition which was due to her fall at work on December 11, 1981.

In an addendum report dated August 11, 1999, Dr. Zaas noted that he had reviewed cervical spine x-rays performed on June 2, 1989, a lumbar MRI scan dated November 6, 1990, an MRI scan dated May 7, 1999, and a series of lumbar spine x-rays dating back to August 5, 1988. He reported that appellant sustained an aggravation and acceleration of preexisting lumbar degenerative disc disease and osteoarthritis at the time of the December 11, 1981 work injury. Dr. Zaas further opined that appellant's lower back had reached maximum medical improvement and that she was totally disabled from “ever returning to work as a letter carrier or any other full-time employment at the [employing establishment].”

In a decision dated October 14, 1999, the Office denied modification of its prior decision.

On April 6, 2000 appellant requested reconsideration.

In an April 12, 2000 decision, the Office denied appellant's request for reconsideration on the grounds that she did not submit evidence sufficient to warrant a merit review.

The Board finds that the Office did not properly terminate appellant's compensation effective June 26, 1998.

Once the Office accepts a claim, it has the burden of proof of justifying modification or termination 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 has ceased or is no longer related to the employment injury.

The Office accepted that appellant sustained contusions to the back, neck and legs when she fell in the performance of duty on June 26, 1998. She has been receiving compensation on the periodic rolls for a number of years because the employing establishment was unable to accommodate her medical restrictions. Recently, a conflict arose in the medical record regarding whether appellant's continuing disability was related to the accepted conditions of her employment injury or to nonwork-related conditions of degenerative disc disease, spondylolisthesis at L4-5, spinal stenosis and exogenous obesity.

Section 8123(a) of the Federal Employees' Compensation Act provides that: "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."¹ Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.²

In accordance with section 8123(a), the Office referred appellant for an impartial evaluation with Dr. Kaufman, who opined that appellant was no longer disabled as a result of her December 11, 1981 employment injury. The Board has duly reviewed Dr. Kaufman's report and finds it to be not sufficiently reasoned to support termination of appellant's compensation benefits. Dr. Kaufman uses words like "probably" not disabled due the work injury and indicates that appellant has "some" residuals in the cervical spine due to the work injury with no explanation as to why these residuals would not contribute to appellant's continuing disability. Because Dr. Kaufman's opinion is speculative³ and it is not supported by sufficient medical rationale for his conclusions⁴ with respect to whether appellant continues to have disability or residuals caused by the work injury, the Board finds that it is not entitled to the special weight. The Board therefore concludes that the Office failed to carry its burden of proof in terminating appellant's compensation.⁵

¹ 5 U.S.C. § 8123(a).

² *Sherry A. Hunt*, 49 ECAB 467 (1998); *Wiley Richey*, 49 ECAB 166 (1997).

³ *See Arthur P. Vliet*, 31 ECAB 366 (1979) (The Board has often held that the opinion of a physician that is speculative in nature is of limited probative value).

⁴ *See generally Ern Reynolds*, 45 ECAB 690 (1994) (The opinion of a physician must be based on a complete factual and medical background of claimant, must be on of reasonable medical certainty and must be supported by medical rationale).

⁵ Given the Board's reversal of the Office's decision on termination, the denial of reconsideration is null and void.

The decisions of the Office of Workers' Compensation Programs dated April 12, 2000, October 14 and June 30, 1999 are hereby reversed.

Dated, Washington, DC
July 23, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member