

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DEBRA R. LEWIS and DEPARTMENT OF HEALTH & HUMAN SERVICES, FEDERAL DRUG ADMINISTRATION, Brooklyn, NY

*Docket No. 00-2452; Submitted on the Record;
Issued February 26, 2002*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits.

The Board has duly reviewed the case on appeal and finds that the Office did not meet its burden 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.¹

On December 15, 1993 appellant, then a 39-year-old consumer safety inspector, sustained an employment-related lumbar sprain. She stopped work on January 5, 1994 and returned on April 13, 1994 with bending and lifting restrictions. The accepted condition was later expanded to include S1 radiculopathy and bulging disc without nerve compression at L4-5. On October 26, 1994 she sustained a recurrence of disability, stopped work and has not returned, other than for brief trials. Appellant was placed on the periodic rolls and has received appropriate compensation.²

¹ See *Patricia A. Keller*, 45 ECAB 278 (1993).

² The record indicates that appellant received overpayments in compensation in the amounts of \$7,579.42, \$200.97 and \$3,040.34 which were waived.

Following further development,³ by letter dated September 29, 1998, the Office referred appellant, along with the medical record, a set of questions and the statement of accepted facts, to Dr. Robert Orlandi, a Board-certified orthopedic surgeon, for a second opinion evaluation. Based on Dr. Orlandi's reports, by letter dated February 2, 1999, the Office proposed to terminate appellant's compensation benefits. She submitted additional medical evidence and, by decision dated March 5, 1999, the Office terminated her compensation, effective that day, finding that the weight of the medical evidence rested with the opinion of Dr. Orlandi.

On April 19, 1999 appellant requested reconsideration and submitted additional medical evidence.⁴ By decision dated June 22, 1999, the Office denied modification of its prior decision. On March 3, 2000 appellant again requested reconsideration and submitted additional evidence. In an April 17, 2000 decision, the Office again denied modification of its prior decision. The instant appeal follows.

The relevant medical evidence includes an August 16, 1994 MRI scan of the lumbosacral spine which revealed generalized bulging at L4-5 and L5-S1. Electrodiagnostic studies performed on August 22, 1994 were compatible with left sacral radiculopathy. A repeat MRI scan of the lumbosacral spine on June 14, 1995 again demonstrated mild disc bulge at L4-5 and L5-S1.

In an October 6, 1998 report, Dr. Robert Orlandi, who performed a second opinion evaluation for the Office, noted that he had reviewed the medical record, described the history of injury and diagnosed lumbar sprain, resolved, stating, "in my opinion [appellant] is alleging a false lumbar pain syndrome." Dr. Orlandi continued that appellant exhibited no gait disturbance or apparent discomfort when she entered his office yet, when she arose after a 10 minute history, she doubled over in back pain. He noted inconsistent findings on her physical examination, concluding that it was his opinion that she was not experiencing organic back pathology, stating that this would strongly be suggested by her normal MRI scan which showed only preexistent L5-S1 narrowing. Regarding the electrodiagnostic studies, Dr. Orlandi advised that he had no reason to suggest that they correlated in any way to her "multiple factitious [sic] findings at this time." Dr. Orlandi concluded:

"In my opinion [appellant] has no causally related disability. [Her] current low back syndrome in fact is not causally related as it exists today. It has no causal relationship to the original injury of record. I recommend no additional diagnostic testing or physical therapy. The prognosis for this alleged low back injury is excellent and she is at maximum medical improvement."

³ In 1995 appellant was referred to Dr. Henry M. Tischler, an orthopedic surgeon, for a second-opinion evaluation. In a report dated May 4, 1995, he advised that appellant continued to be disabled and recommended magnetic resonance imaging (MRI) scan and myelography. In 1996 the Office referred appellant to Dr. Michael V. Marrone, a Board-certified surgeon, for a second opinion evaluation. In an August 26, 1996 report, he advised that appellant could work four hours a day with restrictions. The Office then prepared a memorandum and set of questions indicating that a conflict in the medical opinion existed between the opinions of Drs. Paul and Marrone.

⁴ The record indicates that appellant had requested a hearing on March 15, 1999 but withdrew the request to pursue reconsideration with the Office.

Appellant submitted numerous reports from her treating physicians Board-certified in orthopedic surgeon, Dr. Joseph Leon Paul, who began treating appellant in 1994. In a report dated March 2, 1999, he advised that her symptoms had remained the same since 1994, despite physical therapy and anti-inflammatory medications. Dr. Paul continued:

“Objective testing including MRI [scan], [electromyography and nerve conduction study] and clinical impressions all support the diagnosis of l[umbar] spine derangement with bilateral sciatica. Several treatment regimens were unable to resolve her condition and her symptoms have remained consistent with the injury she received.”

He noted findings on physical examination that day and concluded that her condition had not changed since his last examination. Dr. Paul concluded:

“The condition described above is serious and permanent in nature. [Appellant] needs to continue with physical therapy [two times per] week and anti-inflammatory/analgesic medication [as needed]. No further testing is necessary at this point and it is my opinion that [she] has a permanent partial disability that requires continued treatment.”

In a report dated June 14, 1999, an Office medical adviser advised that Dr. Orlandi’s report was very thorough, with conflicting findings. He stated that Dr. Paul’s reports were not too detailed and recommended that his records be obtained.

When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial specialist, pursuant to section 8123(a) of the Federal Employees’ Compensation Act,⁵ to resolve the conflict in the medical opinion. In this case, although, Dr. Orlandi, the Office referral physician, offered an opinion that appellant’s employment-related back condition had ceased, Dr. Paul, appellant’s treating physician, continued to diagnose an employment-related back condition that rendered her partially disabled. The Office terminated appellant’s compensation benefits on the grounds that her employment-related injury had ceased. The Board finds that the reports of Drs. Paul and Orlandi, who are both Board-certified orthopedic surgeons, are of approximately equal value and are in conflict on the issue of whether appellant continued to suffer from an employment-related back condition. Consequently, the Office did not meet its burden of proof in terminating appellant’s compensation.⁶

⁵ 5 U.S.C. § 8123(a).

⁶ See *Gail D. Painton*, 41 ECAB 492 (1990).

The decision of the Office of Workers' Compensation Programs dated April 17, 2000 is hereby reversed.

Dated, Washington, DC
February 26, 2002

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member