

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PRISCILLA RUCKER and ARCHITECT OF THE CAPITOL,
Washington, DC

*Docket No. 02-234; Oral Argument Held March 12, 2003;
Issued May 5, 2003*

Appearances: *Kirk D. Williams, Esq.*, for appellant; *Douglas S. Collica, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits effective November 30, 2000.

On March 24, 1999 appellant, then a 40-year-old custodial worker, filed a claim alleging that she injured her back while pulling a trash container. The Office accepted appellant's claim for a lumbar strain and paid appropriate compensation. Appellant stopped work and did not return. Appellant submitted medical records from Dr. Peter S. Trent, a Board-certified orthopedist, dated March 25 to April 22, 1999, who noted a history of appellant's work-related injury. He diagnosed appellant with a back strain and recommended physical therapy. Dr. Trent indicated that appellant was to be kept off work for three weeks and continue with physical therapy.

Appellant was referred to a second opinion physician, Dr. Robert Gordon, a Board-certified orthopedist, on May 20, 1999. In a medical report dated June 28, 1999, Dr. Gordon indicated that he reviewed the records provided to him and performed a physical examination of appellant. He noted a history of appellant's work-related injury. Dr. Gordon found that there was no objective evidence of any residual or permanent impairment as a result of this injury. He indicated that appellant did not need any further medical treatment and that she could return to her preinjury position without restrictions. Dr. Gordon submitted an addendum report and indicated that he reviewed the magnetic resonance imaging (MRI) scan film which revealed no real disc herniation. Dr. Gordon indicated that there was nothing in his review of the MRI scan which would change the opinion rendered in his previous report.

Appellant submitted several reports from Dr. Trent dated May 13 to November 14, 1999 and an MRI scan dated June 8, 1999. Dr. Trent noted that appellant continued to experience significant low back pain with restriction of the lumbosacral range of motion. He indicated that

appellant could return to work on July 6, 1999 with restrictions on lifting 25 pounds. Dr. Trent continued to support partial disability due to the work-related injury of March 19, 1999. His reports from July 15 to November 14, 1999 indicated that appellant had returned to work and was in stable condition, noting that her condition was neither improving nor getting worse. Dr. Trent continued to support work restrictions and limited duty. The MRI scan revealed desiccated discs without significant bulge or herniation and degenerative changes of the facet joints without significant stenosis.

On November 15, 1999 the Office issued a notice of proposed termination of compensation on the grounds that Dr. Gordon's reports of June 28 and July 1, 1999 established no continuing residuals or disability as a result of the March 19, 1999 employment injury. The Office provided 30 days in which appellant could respond to this notice.

Appellant submitted reports from Dr. Trent dated November 4, 1999 to November 27, 2000. Dr. Trent's notes of November 4 and December 9, 1999 indicated that appellant was working under restrictions, and continued to experience pain in her back when performing her employment duties. His report of November 6, 2000 noted that appellant continued to be treated for a chronic back injury and had experienced an acute exacerbation of her pain. Dr. Trent's report of November 27, 2000 noted appellant's continued complaints of back pain which radiated into her legs. He noted positive physical findings upon examination of decreased lumbar flexion, tenderness in the lumbar region and spasms in this area as well.

In a decision dated November 30, 2000, the Office terminated appellant's benefits effective that date on the grounds that the weight of the medical evidence established that appellant had no continuing disability resulting from her March 19, 1999 employment injury.

By letter dated December 13, 2000, appellant requested a hearing before an Office hearing representative. The hearing was held on May 18, 2001. Appellant submitted additional reports from Dr. Trent dated December 7, 2000 to February 8, 2001; and an electromyogram (EMG) dated November 30, 2000. The report from Dr. Trent dated December 7, 2000 noted that appellant continued to be treated for a chronic low back injury. He noted positive physical findings of tenderness over the L4-5 and L5-S1 midline; with limited flexion and extension. Dr. Trent noted the results of the EMG which revealed left-sided L5 radiculopathy and right-sided L5-S1 radiculopathy. His report of February 8, 2001 noted appellant's continued chronic back pain.

In a decision dated August 13, 2001, the hearing representative affirmed the November 30, 2000 decision terminating appellant's compensation benefits. However, the hearing representative remanded the case back to Dr. Gordon for a determination as to whether appellant's current disability was causally related to the work injury of March 19, 1999.¹

¹ The Office on December 7, 2001 issued a decision denying appellant's request for continuing compensation and medical benefits. This decision is null and void as the Board and the Office may not simultaneously have jurisdiction over the same case. The Office may not issue a decision regarding the same issue on appeal before the Board. See *Arlonia B. Taylor*, 44 ECAB 591 (1993); *Russell E. Lerman*, 43 ECAB 770 (1992); *Douglas E. Billings*, 41 ECAB 880 (1990).

The Board finds that the Office did not meet its burden of proof to terminate benefits effective November 30, 2000.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.² After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.³

In this case, the Office accepted that appellant sustained a back strain as a result of the March 19, 1999 injury. The Board notes that the Office terminated compensation effective November 30, 2000 based on the report of Dr. Gordon. The Board finds, however, that there is a conflict in medical opinion between Dr. Gordon, the Office referral physician, and Dr. Trent, appellant's treating physician, which was created prior to the termination of benefits.

Dr. Gordon opined that appellant sustained no continuing disability as a result of the work-related injury. He noted that there was no objective evidence of any residual or permanent impairment as a result of appellant's injury. Dr. Gordon noted that appellant did not need any further treatment and that appellant has the physical capacity for any type of work or activity she was performing prior to the work-related accident. He noted that appellant could work without restrictions. By contrast, Dr. Trent found that appellant had residuals of her work-related injury of March 19, 1999 and could only work light duty subject to various work restrictions. He consistently supported partial disability related to appellant's back condition, while Dr. Gordon found that appellant had no continuing work-related disability as a result of the accepted injury.

Section 8123 of the Federal Employees' Compensation Act⁴ provides that, if there is a disagreement between the physician making the examination for the United States and the employee's physician, the Office shall appoint a third physician who shall make an examination.⁵ Because the Office relied on Dr. Gordon's opinion to terminate appellant's compensation without having resolved the conflict, the Office failed to meet its burden of proof.⁶

² *Harold S. McGough*, 36 ECAB 332 (1984).

³ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

⁴ 5 U.S.C. § 8123(a).

⁵ *Shirley L. Steib*, 46 ECAB 39 (1994).

⁶ See *Craig M. Crenshaw, Jr.*, 40 ECAB 919, 923 (1989) (finding that the Office failed to meet its burden of proof because a conflict in the medical evidence was unresolved.).

The decisions of the Office of Workers' Compensation Programs dated August 13, 2001 and November 30, 2000 are reversed.

Dated, Washington, DC
May 5, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member