

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MARY HERBIN and U.S. POSTAL SERVICE,  
POST OFFICE, Philadelphia, Pa.

*Docket No. 97-1210; Submitted on the Record;  
Issued May 13, 1999*

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DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits on May 25, 1996.

On June 6, 1970 appellant, then a 22-year-old mailhandler, filed a claim, Form CA-4, for a recurrence of disability of a May 3, 1970 employment injury, commencing May 23, 1970. The Office accepted appellant's claim for a low back strain. Appellant returned to light-duty work on May 22, 1970, worked intermittently through July 1972 when she stopped working and has since not worked. In his reports dated from October 9, 1986 through July 5, 1995, Dr. Lawrence Weinstein, appellant's treating physician and an osteopath, diagnosed chronic sprain of the thoracic and lumbosacral spine and post-traumatic arthritis. He opined that appellant's condition was directly related to her May 3, 1970 employment injury. In his July 8, 1991 report and subsequent reports, Dr. Weinstein opined that appellant was permanently totally disabled.

In a report dated July 5, 1994, Dr. Norman H. Eckbold, a Board-certified orthopedic surgeon and a second opinion physician, considered appellant's history of injury, performed a physical examination and reviewed a February 28, 1984 x-ray which showed spina bifida occulta of the first thoracic vertebra which was developmental, not traumatic. He was unable to define an alleged injury. Dr. Eckbold found appellant could return to work without restrictions.

To resolve the conflict in the evidence between Dr. Weinstein's opinion that appellant was permanently totally disabled and Dr. Eckbold's opinion that appellant could return to work without restriction, the Office referred appellant to an impartial medical specialist, Dr. William H. Simon, a Board-certified orthopedic surgeon. In his report dated November 8, 1994, Dr. Simon considered appellant's history of injury, performed a physical examination and reviewed a normal electromyogram performed in 1989, x-rays of the cervical spine showing degenerative changes at C4-5, C5-6 and C6-7 and a computerized axial tomography (CAT) scan of the cervical spine showing degenerative changes in the same area as the x-rays as well as a small central disc herniation at C4, C5, T1 and T2. He diagnosed mild to moderate degenerative

joint disease and intervertebral disc disease lumbar spine. Dr. Simon stated that appellant's objective findings on physical and neurological examination and the review of records and 1993 scans do not explain why she had been unable to work for approximately 24 years. He stated that he did not think that the finding of a small disc herniation at C4-5 in the cervical spine was responsible for her complaints particularly since her major complaints were in the back and left leg. Dr. Simon stated that appellant did have some psychological abnormalities in that she appeared depressed and that she might require a key functional assessment in order to obtain a valid determination on her response. Dr. Simon recommended that appellant undergo a magnetic resonance imaging (MRI) scan to determine if she had any disc herniation in the lumbar spine.

In his report dated December 1, 1994, Dr. Simon reviewed the MRI scan dated November 17, 1994, which showed a mild protrusion of the L4-5 disc in the T1 sagittal and degenerative changes at L4-5 and L5-S1. He stated that these changes on the MRI did not indicate residuum of any trauma on May 3, 1970 and did not explain why appellant was unable to return to work. Dr. Simon stated that the x-rays showed that appellant should be subject to lifting and bending restrictions based on degenerative disc disease in the neck and low back but these restrictions were not due to the May 3, 1970 employment injury.

By decision dated May 6, 1996, the Office terminated appellant's compensation benefits effective May 25, 1996 on the grounds that the weight of the medical evidence in the record established that she had fully recovered from her May 3, 1970 employment injury.

By letter dated May 16, 1996, appellant requested an oral hearing before an Office hearing representative which was held on November 21, 1996. At the hearing, appellant described the May 3, 1970 employment injury that she returned to light-duty work had a recurrence and stopped working in 1972. Appellant testified that she had trouble sleeping at night due to pain, that she had trouble performing household chores such as vacuuming and interacting with her daughter as in lifting her or playing with her and was unable to do sports such as tennis which she could do prior to her injury. Appellant also testified that prior to her injury she did not have a psychological problem and after the injury, she had no psychological treatment since 1974. Appellant's mother also testified, stating that after the May 3, 1970 employment injury, appellant suffered much pain and was capable of very limited activity. Appellant's attorney argued that the Office improperly reduced appellant's compensation benefits in 1978 and that the medical evidence reveals that appellant had an emotional condition resulting from the May 3, 1970 employment injury which neither the second opinion physician, Dr. Eckbold, nor the impartial medical specialist, Dr. Simon, addressed.

By decision dated December 24, 1996, the Office hearing representative affirmed the Office's May 6, 1996 decision.

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

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits. 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.<sup>1</sup> The Office's burden of proof includes the necessity of furnishing rationalized medical evidence based on a proper factual and medical background.<sup>2</sup>

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.<sup>3</sup> In the present case, to resolve the conflict between appellant's treating physician, Dr. Weinstein, that appellant was permanently totally disabled due to the May 3, 1970 employment injury and the second opinion physician, Dr. Eckbold, the Office referred appellant to an impartial medical specialist, Dr. Simon, a Board-certified orthopedic surgeon. In his reports dated November 8 and December 8, 1994, Dr. Simon considered appellant's history of injury, performed a physical examination, and reviewed x-rays, a CAT scan and the November 17, 1994 MRI scan and diagnosed degenerative disc disease in the neck and low back. He stated that appellant required work restrictions based on those changes but that these were not related to any objective residuum of trauma resulting from the May 3, 1970 employment injury. Dr. Simon found that the small disc herniation at C4 and C5 and T1 and T2 did not account for appellant's complaints of pain since her major complaints were in the back and left leg. He found that particularly because the MRI showed nonwork-related degenerative changes, appellant had recovered from the May 3, 1970 employment injury. The Board finds that Dr. Simon's opinion is well rationalized and based on a proper factual background. Therefore, as an impartial medical specialist, Dr. Simon's opinion constitutes the weight of the evidence.<sup>4</sup>

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<sup>1</sup> *Wallace B. Page*, 46 ECAB 227, 229-30 (1994); *Jason C. Armstrong*, 40 ECAB 907, 916 (1989).

<sup>2</sup> *Larry Warner*, 43 ECAB 1032 (1992); *see Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>3</sup> *Kathryn Haggerty*, 45 ECAB 383, 389 (1994); *Jane B. Roanhaus*, 42 ECAB 288 (1990).

<sup>4</sup> Although appellant references statements by an Office representative and by doctors in the record from 1977 through 1994, which state or suggest that appellant has an emotional condition not one of the doctor's reports state that the emotional condition is causally related to appellant's employment. The burden is on appellant to submit rationalized medical opinion evidence to establish a causal relationship between her emotional condition and implicated employment factors, *see Kathryn Haggerty, supra*, note 3 at 389 and appellant has not met this burden.

The decisions of the Office of Workers' Compensation Programs dated December 24 and May 6, 1996 are hereby affirmed.

Dated, Washington, D.C.  
May 13, 1999

Willie T.C. Thomas  
Alternate Member

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member