

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RAMINDER K. SINGH and U.S. POSTAL SERVICE,
POST OFFICE, Detroit, MI

*Docket No. 98-2129; Submitted on the Record;
Issued August 29, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the of Workers' Compensation Programs met its burden of proof to terminate benefits effective March 28, 1997.

The Office accepted appellant's claim for myofascitis of the upper back and neck and pericapsulitis of the right shoulder. Appellant worked intermittently after suffering recurrent periods of disability and returned to light-duty work on May 7, 1991.

In a report dated May 21, 1991, Dr. L. James Roy, a Board-certified orthopedic surgeon and a second opinion physician, considered appellant's history of injury, performed a physical examination and reviewed x-rays, which were normal. He diagnosed direct contusion and sprain of the neck and shoulders related to the January 2, 1990 employment injury. Dr. Roy considered that appellant's symptoms were minimal, that her physical examination showed only minimal irritability in her neck and shoulders, that her x-rays were normal and concluded that she could return to work without restrictions.

In reports dated January 12 and July 19, 1995, appellant's treating physician, Dr. Michael R. Lubetsky, a Board-certified internist, with a specialty in rheumatology, diagnosed myofascial pain syndrome and opined that appellant required restrictions to work.

In correspondence dated May 5 and August 4, 1995, the Office indicated that it was seeking a second opinion examination for appellant. However, by letters dated August 4 and 7, 1995 to appellant and Dr. Pollak, respectively, the Office indicated that it was referring appellant to Dr. Pollak to resolve the conflict in the evidence between Dr. Roy's May 21, 1991 opinion and Dr. Lubetsky's 1995 opinion as to whether appellant could perform her usual work. In his report dated August 18, 1995, Dr. Pollak considered appellant's history of injury, performed a physical examination and reviewed x-rays, which were normal. In his physical examination, he found that in a seated position appellant had one half of the normal cervical motion in all planes including forward flexion, hyperextension and bilateral turning and bending. Dr. Pollak also

found that appellant's right shoulder flexed to only 100 degrees and attempts of passive flexion beyond that were met with resistance and complaints of pain. Dr. Pollak found generalized tenderness throughout the entire right paracervical area, right base of neck, right upper trapezius region and entire right shoulder in global fashion including superiorly, anteriorly, laterally and posteriorly. He found that appellant's motor strength was weak but bilaterally equal throughout the upper limbs.

Dr. Pollak concluded that there were no objective nor consistent subjective findings that would indicate a disabling or pathological condition. He opined that appellant could work without restrictions and did not require further treatment.

By letter dated June 13, 1996, the Office reiterated that it was seeking a second opinion examination for appellant.

Subsequently, in a report dated February 6, 1997, Dr. Lubetsky found that appellant continued to have symptoms of pain in her neck, right upper back and shoulder and that she took Motrin two to three times a day. He found that she had pain on range of motion of the right shoulder and was tender over the right trapezius muscle. Dr. Lubetsky opined that appellant's symptoms were going to be a continuing problem and she should be allowed to continue in her present position performing light-duty work. He stated that she should not lift more than five pounds and might need extra rest periods.

By decision dated March 31, 1997, the Office terminated appellant's compensation benefits effective March 28, 1997, finding that the opinion of Dr. Pollak as an impartial medical specialist constituted the weight of the medical evidence and established that any medical residuals causally related to the accepted employment injury had ceased no later than that date.

By letter dated April 15, 1997, appellant requested an oral hearing before an Office hearing representative, which was held on January 26, 1998. At the hearing, appellant's representative contended that Dr. Roy's April 1991 opinion should not have been used more than five years after it was acquired as it is dated and for that reason, it should not have been used as a basis for posing a conflict in the medical evidence. The legal representative contended that Dr. Pollak's opinion was not valid since, on physical examination, he found the same symptoms of restricted cervical motion and generalized tenderness throughout the right paracervical area, which appellant had been having all along. Further, the legal representative contended that Dr. Pollak's opinion should also not be used because it was more than one and a half years old.

Appellant described the history of her January 2, 1990 employment injury, stated that she had been performing light-duty work and stated that she still had numbness in her hand and her arm. She also described her medical treatment. Appellant stated that she could not perform full-duty work because her shoulder and her neck hurt her and required that she change her sitting and standing positions to ease the pain.

Appellant submitted reports from Dr. Lubetsky dated April 9, 1997 and January 20, 1998. In his April 9, 1997 report, Dr. Lubetsky found that appellant's symptoms of pain in the neck, right upper back and shoulder had continued since the January 2, 1990 employment injury. He also found that appellant's myofascial pain syndrome was a result of the injury of that date and

she continued to be symptomatic. Dr. Lubetsky stated that appellant had objective findings of tenderness around the right trapezius muscle and pain on abduction of the right shoulder. He opined that she could not work as a letter carrier due to this condition and should continue with her restrictions.

In his January 20, 1998 report, Dr. Lubetsky considered appellant's history of injury and performed a physical examination, which showed continued tenderness over the right trapezius muscle. He stated that sometimes appellant had pain on range of motion of the neck and right shoulder. Dr. Lubetsky stated that appellant continued to require lifting restrictions of no more than five pounds and might require extra rest periods. He reiterated his diagnosis of myofascial pain syndrome, secondary to the January 2, 1990 employment injury.

By decision dated April 10, 1998, the Office hearing representative affirmed the Office's March 31, 1997 decision, stating that as the impartial medical specialist, Dr. Pollak's opinion that appellant could return to work without restriction constituted the weight of the evidence.

Once the Office accepts 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 disabling condition has ceased or that it is no longer related to the employment.¹ The Office's burden of proof includes the necessity of furnishing rationalized medical evidence based on a medical background.²

In the present case, the Office correspondence dated May 5 and August 4, 1995 indicated that the Office was seeking a doctor for a second opinion examination. In its correspondence dated August 4 and August 7, 1995, the Office informed appellant and Dr. Pollak, respectively, that appellant was being referred to Dr. Pollak, as an impartial medical specialist, to resolve the conflict between Dr. Roy's May 21, 1991 opinion and Dr. Lubetsky's 1995 opinion as to whether appellant was able to perform her usual work. By letter dated June 13, 1996, the Office reiterated that it was seeking a doctor for a second opinion examination. In the April 10, 1998 decision, the Office hearing representative affirmed the Office's March 31, 1997 decision on the grounds that Dr. Pollak's opinion as an impartial medical specialist constituted the weight of the evidence and established that appellant was able to perform her usual work. The Office erred, however, in identifying Dr. Pollak as an impartial medical specialist. Since Dr. Roy's May 21, 1991 opinion was over four years old, his opinion that appellant could perform her usual work was not competent to establish a conflict with Dr. Lubetsky's 1995 opinion that appellant required restrictions to work.³ Further, since Dr. Roy's opinion was not competent to establish a conflict in the evidence, Dr. Pollak could not be identified as an impartial medical specialist as there was no conflict in the evidence when appellant was referred to him. Rather, consistent with the Office's May 5 and August 4, 1995 correspondence, he served the role of a second opinion physician. In his February 6 and April 9, 1997 and January 20, 1998 reports,

¹ *Patricia M. Mitchell*, 48 ECAB 371 (1987); *Patricia A. Keller*, 45 ECAB 278 (1993).

² *Larry Warner*, 43 ECAB 1027 (1992); *see Del K. Rykert*, 40 ECAB 284, 295-296 (1988).

³ *See Arthur Sims*, 46 ECAB 880, 887 (1995).

Dr. Lubetsky opined that appellant continued to have symptoms of pain in her neck, right upper back and shoulder and tenderness around the right trapezius muscle and pain on abduction of the right shoulder. He opined that appellant required work restrictions. Dr. Pollak's August 18, 1995 report in which he stated that appellant could return to work without restrictions based on the normal x-rays and his findings on physical examination created a conflict with Dr. Lubetsky's 1997 and 1998 opinion that appellant required restrictions to work.

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.⁴ The conflict in the record between Dr. Lubetsky and Dr. Pollak as to whether appellant could perform her usual work is unresolved.⁵ As the conflict in the evidence remains between Dr. Lubetsky's and Dr. Pollak's opinion, the Office has not met its burden of proof to terminate benefits.

The decision of the Office of Workers' Compensation Programs dated April 10, 1998 is hereby reversed.

Dated, Washington, D.C.
August 29, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁴ *Kathryn Haggerty*, 45 ECAB 383, 389 (1994).

⁵ *See Melvina Jackson*, 38 ECAB 443, 451 (1987).