

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. 02-1980; Submitted on the Record;
Issued December 23, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
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 21, 2002.

This case is on appeal to the Board for the second time.¹ On the first appeal, the Board reversed the Office's decision dated April 10, 1998, in which the Office hearing representative affirmed the Office's March 31, 1997 decision terminating appellant's compensation benefits effective March 28, 1997. The Office terminated appellant's benefits based on the opinion of the impartial medical specialist, Dr. Norman J. Pollak, a Board-certified orthopedic surgeon, dated August 18, 1995, that appellant was no longer disabled due to the January 2, 1990 employment injury and required no further treatment. The Board found, however, that the Office improperly identified Dr. Pollak as an impartial medical specialist because there was no valid conflict in the medical evidence for him to resolve. The Office found that a conflict existed between the opinions of appellant's treating physician, Dr. Michael R. Lubetsky, a Board-certified internist, dated January 12 and July 19, 1995, that appellant required restrictions to work, and the opinion of the referral physician, Dr. L. James Roy, a Board-certified orthopedic surgeon, dated May 21, 1991, that appellant could work without restrictions. The Board found, however, that, since Dr. Roy's May 21, 1991 opinion was over four years old, his opinion was not competent to establish a conflict with Dr. Lubetsky's January 1995 opinion. The Board, therefore, found that there was no conflict in the evidence when appellant was referred to Dr. Pollak and Dr. Pollak actually served the role of a second opinion physician. The Board found that a conflict existed between Dr. Lubetsky and Dr. Pollak regarding whether appellant recovered from his January 2, 1990 employment injury, but that conflict was unresolved. The Board concluded that the Office had not met its burden to terminate benefits.

¹ Docket No. 98-2129 (issued August 29, 2000). The facts and history surrounding the prior appeal are set forth in the initial decision and is hereby incorporated by reference.

To resolve the conflict between Dr. Lubetsky and Dr. Pollak, the Office subsequently referred appellant to the impartial medical specialist, Dr. Philip J. Mayer, a Board-certified orthopedic surgeon, dated June 5, 2001. In his report, Dr. Mayer considered appellant's history of injury, performed a physical examination, reviewed x-rays and reviewed Dr. Roy's, Dr. Lubetsky's and Dr. Pollak's reports. He stated that on examination appellant had no objective abnormalities to indicate radiculopathy, myelopathy or other significant musculoskeletal pathology. Dr. Mayer stated that appellant had inconsistencies on examination as in feeling no pain while sitting during the straight leg raising test but feeling great pain while supine during plantar flexion maneuvers and rotation. He stated that the inconsistencies "clearly indicate an embellishment of her pain complaint without objective organic pathology being the etiology."

Dr. Mayer stated:

"It is my opinion that there is no objective basis to cite any ongoing disability that can be causally related to her history of slip and fall in 1990. The diagnosis of myofascial pain cannot be substantiated by objective testing criteria. It is my opinion that any bruise or contusion sustained at the time of [appellant's] slip and fall would have healed or resolved by this time, which is nearly 11 years from the time of her fall. [Appellant] has only a subjective complaint of pain which cannot be verified by objective testing."

He concluded that appellant could return to work without restrictions and her complaint of pain was unrelated to her history of remote trauma.

On July 5, 2001 the Office issued appellant a notice of proposed termination of compensation and authorization for continuing medical care based on Dr. Mayer's opinion.

On August 7, 2001 the Office stated that it received no additional medical or factual evidence from appellant and terminated her compensation benefits effective August 7, 2001.

By letter dated August 16, 2001, appellant requested an oral hearing before an Office hearing representative which was held on February 27, 2002. At the hearing, appellant's representative, Steve Burt, contended that Dr. Mayer's report did not fairly mediate between Dr. Lubetsky and Dr. Pollack because Dr. Mayer made "repeated references" to Dr. Roy's opinion which had been discredited by the Board in its August 29, 2000 decision. Mr. Burt also contended that, just as the Board found that Dr. Roy's May 21, 1991 opinion was not competent to create a conflict because it was more than four years old compared to Dr. Lubetsky's 1991 opinion, the Board should find that Dr. Pollak's report, dated August 18, 1995, which was more than six years old in relation to Dr. Mayer's June 5, 2001 opinion, was not competent to create a conflict with Dr. Lubetsky's opinion.

Appellant testified explaining how her January 2, 1990 employment injury occurred, that she continued to have pain in her neck and numbness in her hand and her arm and she could not do "regular things" such as picking up objects from the floor or turning while driving. She stated that she was retired on disability. Appellant described her medical treatment and stated that she was still seeing Dr. Lubetsky.

By decision dated May 21, 2002, the Office hearing representative affirmed the Office's August 7, 2001 decision.

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective August 7, 2001.

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.² The Office's burden of proof includes the necessity of furnishing rationalized medical evidence based on a proper factual and medical background.³

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 a specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.⁴

In this case, subsequent to the Board's August 29, 2000 decision, the Office referred appellant to the impartial medical specialist, Dr. Mayer, for him to resolve the conflict in the evidence between Dr. Lubetsky's and Dr. Pollak's opinions regarding whether appellant continued to be disabled due to the January 2, 1990 employment injury. After considering appellant's history of injury, performing a physical examination, reviewing diagnostic tests and all the relevant medical reports of record, Dr. Mayer found that there was no objective evidence of disability that could be causally related to appellant's January 2, 1990 employment injury. He stated that the accepted condition of myofascial pain was not substantiated by the objective evidence and appellant's bruise or contusion sustained at the time of her fall would have healed. Dr. Mayer concluded that appellant could return to work without restriction and her complaint of pain was not work related. His opinion is complete and well rationalized and, since Dr. Mayer is an impartial medical specialist, his opinion constitutes the weight of the evidence.

Contrary to appellant's contentions, Dr. Mayer did not give undue weight to Dr. Roy's report so as to render his report defective. He also considered Dr. Pollak's and Dr. Lubetsky's opinions and relied on diagnostic tests and physical findings on examination in reaching his conclusion. It was appropriate for Dr. Mayer to consider Dr. Roy's opinion, in addition to the other medical evidence, because Dr. Roy's opinion was part of the record and Dr. Roy, while deemed by the Board not to have the status of an impartial medical specialist, was a referral physician. Further, appellant misconstrues the nature of the problem the Board found with Dr. Roy's opinion in the first decision. In that decision, because of the discrepancy in the date between the earliest opinion of appellant's treating physician, Dr. Lubetsky, in January 1995, and the opinion of the referral physician, Dr. Roy, dated May 21, 1991, the Board found a conflict

² *Wallace B. Page*, 46 ECAB 227, 229-30 (1994); *Jason C. Armstrong*, 40 ECAB 907, 916 (1989).

³ *Larry Warner*, 43 ECAB 1027, 1032 (1992); *see Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

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

was not created between the two doctors. Dr. Pollak's August 18, 1995 opinion, however, creates a conflict with Dr. Lubetsky's January 1995 opinion as there is no significant discrepancy in time between those doctor's opinions. The timeliness of Dr. Pollak's opinion is measured against Dr. Lubetsky's opinion for the purposes of creating a conflict, not Dr. Mayer's opinion.⁵ A valid conflict was created between Dr. Lubetsky's and Dr. Pollak's opinions and it was proper for the Office to refer appellant to Dr. Mayer. Because Dr. Mayer's opinion, that appellant did not have a work-related condition and could return to unrestricted work, constitutes the weight of the evidence, the Office was justified in terminating appellant's compensation benefits.

The May 21, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
December 23, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

⁵ Moreover, the most recent report in the record from Dr. Lubetsky is dated January 20, 1998.