

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**IRENE P. YEARY, Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Cincinnati, OH, Employer**

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**Docket No. 04-855  
Issued: June 18, 2004**

*Appearances:*  
*Alan J. Shapiro, for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chairman  
DAVID S. GERSON, Alternate Member  
A. PETER KANJORSKI, Alternate Member

**JURISDICTION**

On February 11, 2004 appellant, through counsel, filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated December 4, 2003 which terminated her compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue on appeal is whether the Office met its burden of proof in terminating appellant's compensation benefits effective December 4, 2003, on the grounds that her work-related disability had ceased on or before that date.

**FACTUAL HISTORY**

On November 12, 1996 appellant, a postal clerk born June 15, 1940 injured her back while lifting a tub of mail off the top of a cart during her federal employment. The Office

accepted the claim for acute lumbar strain and herniated disc at L3-4.<sup>1</sup> Following the injury appellant worked with restrictions and later stopped work entirely on March 28, 1998.

The record reflects that Dr. Roger Meyer, a Board-certified orthopedic surgeon treated appellant for her accepted injuries. The Office determined that, in a narrative report dated March 15, 1999, Dr. Meyer concluded that appellant was not medically capable of returning to work due to her work-related low back condition. He opined that appellant was unable to sit, stand or walk for an unspecified period of time and then noted that her condition and resulting disability was permanent.<sup>2</sup>

The Office subsequently reviewed the claim and referred appellant to Dr. Richard Sheridan, a Board-certified orthopedic surgeon. In his report dated April 27, 2000, Dr. Sheridan discussed the work injury, treatment and his examination of appellant's lumbar spine. He found that appellant did not have any clinical or laboratory findings to indicate that the accepted conditions were still active and causing her present findings. Dr. Sheridan opined that appellant's herniated disc was an investigative finding without pathological expression; that there was no evidence of radiculopathy which one would expect with a herniated disc. He further opined that the lumbar spine strain resolved four months after the event and that there were no findings to indicate that any current disability was due to the accepted conditions rather than the underlying degenerative condition of her spine.

The Office thereafter determined that a conflict in medical opinion existed and referred appellant to Dr. William Fitz, a Board-certified orthopedic surgeon for an independent medical examination. The record reflects that Dr. Fitz examined appellant and determined in his report dated August 10, 2000 that appellant's current pain behaviors, reduced range of motion and positive straight leg raise supported continued disability. The record reflects that he related the symptoms primarily to L4-5 and L5-S1 levels and not the L3-4 herniated discs and indicated further that there was some indication of symptom magnification. He further submitted an OWCP-5 form which outlined his incapacity to perform physical duties.<sup>3</sup>

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<sup>1</sup> The record reflects that appellant also has a history of degenerative disc disease of the spine and scoliosis.

<sup>2</sup> The Board notes that Dr. Meyer's March 15, 1999 report which purportedly caused the Office to seek a second opinion in this case is not of record. Subsequent reports of record from Dr. Meyer confirm his opinion that appellant was off work due to her accepted condition for an indefinite period of time. In a chart note dated May 2, 2002, Dr. Meyer indicated that appellant complained of increased lower back pain and he reported that, on examination, the lower back was tender and that her range of motion flexion wise was to approximately 45 degrees as it had been and no further neurologic symptoms. He stated: "I do not think that there is much more that we can offer this lady, as her magnetic resonance imaging (MRI) scan indicates multiple levels of degenerative disc disease and facet arthritis without any neural impingement. Dr. Meyer submitted a disability slip also dated May 2, 2002 which noted that appellant was off work indefinitely.

<sup>3</sup> The Board notes that the August 10, 2000 report and an August 20, 2000 OWCP-5 form from Dr. Fitz referred to above are also not of record. The Office subsequently requested a supplemental statement from the physician dated August 19, 2002 which is of record and makes specific reference to the missing documents. Because the addendum report did not prove sufficient to resolve the outstanding conflict and the Office did not ultimately rely on the opinion of Dr. Fitz to resolve the outstanding issue in this case, the absence of these reports are not fatal.

On October 25, 2001 the Office requested an addendum report from Dr. Fitz, the referee examiner utilized by the Office. The Office advised that the employing establishment had performed an investigation with periodic surveillances of appellant's physical activities between February 23 and July 26, 2001 and requested that he review the videotape and photographs obtained. The Office stated:

“It is noted in the videotape that the claimant's activities appear to be outside of the realm of the restrictions stated on Form OWCP-5 dated August 20, 2000 (copy attached). Based on the observations from the videotape which show the claimant walking, bending, lifting, jogging and carrying children, please provide your opinion as to whether the claimant is capable of performing some type of work in light of the evidence submitted. If the claimant is capable of some type of work, please state the restrictions on the attached OWCP-5 for which the claimant may be reemployed. If you believe the claimant is still incapable of any type of work after viewing the [video]tape and photo[graph]s, please explain your medical rationale for your response.”

On January 8, 2002 the Office also furnished Dr. Fitz with a copy of appellant's case file so he could base his opinions on both the videotape and the contents of the file.

On October 1, 2002 the Office received an August 19, 2002 addendum report from Dr. Fitz following his review of the videotape and medical reports from Dr. Meyer's office. The physician stated:

“In my initial visit with [appellant] on August 10, 2000 she indicated difficulties at that time with pain associated with sitting, standing, rising from a seated position, leaning forward, walking, driving, coughing, bending and twisting. She stated that at that time she did not cook, clean, do the laundry or shop secondary to pain. By the time these images were obtained in May of 2001 it appeared that her condition had improved with regards to her physical capabilities. She did not exhibit any pain behaviors in the videotape, although certainly the videotape may have been edited to edit out such behaviors. Therefore, it is difficult for me, off a videotape that may have been altered, to assess fully her physical capabilities. Certainly she appears to at times be able to lift, carry, twist and bend, push strollers and jog for short distances. I don't think that it is appropriate to determine ones functional capacity from a videotape of isolated activities. Therefore, to obtain a more objective analysis I would suggest a functional capacity evaluation with validity tests performed with the functional capacity evaluation to better assess her functional capabilities. If the evaluation is invalid due to internal inconsistencies, then I would lean towards the possibility of malingering in this individual. My first examination of her did show amplification of her symptomatology which makes an objective assessment very difficult. Therefore, I have not completed a work capacity evaluation form as requested and would defer to a formal functional capacity evaluation performed by a certified physical therapist to assess more objectively her abilities at this time. That, combined with a more recent examination by an independent medical

examiner, would be appropriate to assess her current functional capabilities and condition.”

In a memorandum of file dated October 7, 2002, an Office claims examiner reviewed Dr. Fitz’s report and determined it should be set aside and appellant be referred for a new independent medical examination. The claims examiner determined that Dr. Fitz had failed to provide his well-rationalized and unequivocal opinion regarding appellant’s level of work-related disability, the issue of conflict. In a letter dated February 26, 2003, the Office advised appellant of its determination regarding Dr. Fitz’s report and informed her that she would be referred to a second independent medical examination.

Appellant was referred to Dr. Malcom Meyn, a Board-certified orthopedic surgeon, who, in a report dated May 30, 2003, reviewed the statement of accepted facts, the history of injury which caused the accepted conditions, the medical record, including objective findings and subjective complaints and the investigation findings of appellant’s activities observed outside the workplace. The physician noted that appellant complained of continued back and bilateral leg pain worse on the left. Dr. Meyn stated:

“It is my opinion that [appellant] does not suffer from any residuals that can be causally related to the accepted conditions of ‘acute lumbar strain and/or herniated disc at L3-4.’ She does not have any reflex abnormalities at the knees, nor does she have any weakness of her quadriceps mechanism. She also has no sensory deficit in the area of the L3-4 dermatome, which is on the anterior thigh extending down on the lateral side of the calf. As far as the lumbar strain is concerned, the videotape and still photos reviewed negate any subjective complaints in this area.

“It is my opinion that [appellant] is not capable of returning to her regular job, which requires lifting up to 80 pounds.... However this is not due to her injury. She is not capable of lifting 80 pounds simply because of her physical size.... She is *not* precluded from performing any type of work.” (Emphasis added.)

Dr. Meyn submitted a work capacity evaluation on May 29, 2003 and determined that appellant could work eight hours in the sedentary or light-duty position with restrictions on pushing, pulling, lifting, squatting, kneeling, climbing, walking, standing and reaching.

On October 22, 2003 the Office issued a proposed notice of termination of compensation. The Office advised appellant that her compensation for wage-loss and medical benefits was being terminated because she no longer suffered from active residuals of her accepted lumbar strain and herniated disc at L3-4. Appellant was given 30 days to submit additional evidence or argument.<sup>4</sup>

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<sup>4</sup> On November 3, 2003 the Office received a letter dated October 31, 2003 from appellant’s representative which indicated that he had been recently retained in this matter and requested 30 additional days to obtain evidence. The Office advised the representative that authorization assigning him as appellant’s attorney was required and in a letter received December 22, 2003 appellant provided the requisite authorization.

By decision dated December 4, 2003, the Office finalized the notice of proposed termination of compensation and medical benefits. The Office indicated that the weight of the medical evidence, as demonstrated by the opinion of Dr. Meyn, established that appellant no longer suffered from active residuals of the work-related conditions and that appellant could return to light-duty work with specified restrictions.

### **LEGAL PRECEDENT**

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.<sup>5</sup> After it has determined that an employee has a 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>6</sup> Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.<sup>7</sup> To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which would require further medical treatment.<sup>8</sup>

### **ANALYSIS**

The Office determined that a conflict of medical opinion existed based on the opinions of Dr. Meyer, appellant's Board-certified orthopedist and Dr. Sheridan, a Board-certified orthopedic surgeon and Office referral physician. Therefore, the Office properly referred appellant to an impartial medical examiner,<sup>9</sup> Dr. Fitz, a Board-certified orthopedic surgeon. The record reflects that Dr. Fitz submitted reports dated August 10 and 20, 2000 in which he found that appellant's current pain behaviors, reduced range of motion and positive straight leg raise supported continued disability. The Office requested a supplemental report from Dr. Fitz after it obtained surveillance footage from the employing establishment of appellant performing various physical activities outside her employment in May 2001. In an addendum report dated August 19, 2002, Dr. Fitz suggested that appellant's condition apparently improved at the time of the 2001 footage and indicated that it was difficult for him to fully access appellant's physical capabilities. The Office determined that Dr. Fitz did not adequately clarify his opinion and, to resolve the continuing conflict in the medical evidence, referred appellant to Dr. Meyn, a Board-certified orthopedic surgeon, for an impartial medical examination.

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<sup>5</sup> *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

<sup>6</sup> *Id.*

<sup>7</sup> *Furman G. Peake*, 41 ECAB 361, 364 (1990).

<sup>8</sup> *Id.*

<sup>9</sup> The Federal Employees' Compensation Act provides that, if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination. 5 U.S.C. § 8123(a).

The Board finds that the Office properly relied on the second impartial medical examiner's May 30, 2003 report as a basis for terminating benefits. Dr. Meyn's opinion is sufficiently well rationalized and based upon a proper factual background. He not only examined appellant, but also reviewed his medical records and surveillance videotape and photographs related to the employing establishment investigation. Dr. Meyn determined that appellant no longer had residuals of the November 12, 1996 employment injury. He explained that the findings on examination and diagnostic testing, including the lack of sensory deficit in the area of the L3-4 dermatome and the absence of weakness in the quadriceps mechanism, showed that appellant's employment injury had resolved. He concluded that there was no evidence to suggest that appellant was disabled from work due to employment factors.<sup>10</sup> The Office properly accorded determinative weight to the impartial medical examiner's May 30, 2003 findings.<sup>11</sup> Accordingly, the Board finds that the Office met its burden of proof in terminating appellant's wage-loss compensation and medical benefits.<sup>12</sup>

### CONCLUSION

The Board finds that the Office properly terminated appellant's wage-loss compensation and medical benefits effective December 4, 2003.

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<sup>10</sup> Dr. Meyn recommended some work restrictions, but he clearly indicated that they were not necessitated by residuals of the employment injury.

<sup>11</sup> In cases where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight. *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

<sup>12</sup> The record contains a few brief reports from late 2003 of Dr. Meyer, an attending Board-certified orthopedic surgeon, but these reports do not clearly indicate that appellant had continuing employment-related residuals.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated December 4, 2003 is affirmed.

Issued: June 18, 2004  
Washington, DC

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

A. Peter Kanjorski  
Alternate Member