

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CATHERINE NELSON and U.S. POSTAL SERVICE,
GENERAL MAIL FACILITY, Wichita, KS

*Docket No. 00-279; Submitted on the Record;
Issued December 12, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant has any continuing disability due to her accepted employment-related conditions of cervical, thoracic and lumbar strains and right foot and wrist strains after November 6, 1996; and (2) whether appellant has established intermittent periods of disability from May 31, 1996 to March 6, 1997 and a permanent impairment for schedule award purposes.

The Board has duly reviewed the case on appeal and finds that appellant has no continuing disability due to her accepted employment injuries after November 6, 1996.

Appellant, a distribution clerk, filed a notice of occupational disease on March 20, 1996 alleging that she developed back injuries due to moving heavy equipment in the performance of duty. By decision dated March 6, 1997, the Office of Workers' Compensation Programs accepted appellant's claim for cervical, thoracic and lumbar strains as well as right foot and wrist strains with disability ending on November 6, 1996.

Appellant requested reconsideration on September 8, 1997. By decision dated October 30, 1998, the Office denied modification of its prior decision. Appellant requested reconsideration on March 31, 1999 and by decision dated June 23, 1999, the Office denied modification of its prior decisions.

On June 18, 1997 appellant requested wage-loss compensation from May 31, 1996 to March 6, 1997. Appellant also requested a schedule award. By decision dated August 2, 1999, the Office found that appellant had not established any compensable period of disability from May 31, 1996 to March 6, 1997 or a permanent impairment entitling her to a schedule award.

Appellant's attending physician, Dr. Frank J. Kutilek, an osteopath, on June 26, 1997 indicated that appellant was totally disabled beginning May 31, 1996. Dr. Kutilek diagnosed recurrent right sacroiliac subluxation, recurrent lumbosacral strain, recurrent cervicothoracic

strain, cephalgia, unstable right wrist and bilateral plantar arch strain with metatarsalgia causally related to appellant's employment duties. The Office referred appellant to Dr. Robert A. Rawcliffe, a Board-certified orthopedic surgeon, for a second opinion evaluation.

On October 21, 1996 Dr. Kutilek stated that appellant's symptoms had improved since she was not working and that appellant should perform light-duty work.¹

In a report dated November 6, 1996, Dr. Robert A. Rawcliffe Jr., noted appellant's history of injury and performed a physical examination. He found normal cervical spine with no tenderness or spasm and full range of motion. Dr. Rawcliffe stated that appellant's shoulder range of motion was full with no evidence of atrophy, but appellant complained of pain in the extremes of motion. Examination of appellant's right wrist revealed no tenderness, deformity or swelling with normal range of motion. Dr. Rawcliffe found diffuse tenderness in the mid thoracic spine with no paravertebral muscle spasm. He also reviewed x-rays and found no anomaly of clinical significance in the spine, wrist or shoulder.

Dr. Rawcliffe concluded that appellant had developed muscular overstrain in her cervical, thoracic and lumbar spine as a result of her regular duties and that the extended period of time on light duty as well as duty free beginning May 31, 1996 should have allowed appellant "more than adequate time to recover from any soft tissue injuries incurred as a result of her work activities." He found no evidence to support the diagnosis of any permanent medical condition. Dr. Rawcliffe noted that appellant had a very small and slender build and was probably not suited to an occupation as strenuous as that described in the statement of accepted facts.

Based on his report, the Office determined in its March 6, 1997 decision that appellant did not have any employment-related disability or residuals after November 6, 1996.

In her request for reconsideration, appellant submitted additional reports from Drs. Kutilek and John P. Estivo, an osteopath. Dr. Estivo reported on June 17, 1997 that appellant had slight tenderness in the thoracic spine, shoulder, wrist and hip with full range of motion. He diagnosed thoracic sprain, right shoulder rotator cuff sprain and right hip sprain. In a report dated August 5, 1997, Dr. Kutilek noted appellant's history of injury and medical treatment. He disagreed with Dr. Rawcliffe, finding that appellant had residuals and could not return to her date-of-injury position. Dr. Kutilek repeated his earlier diagnoses and recommended lighter-duty work.

The Office properly found a conflict of medical opinion evidence between appellant's attending physician, Dr. Kutilek, who supported continued disability and residuals, and the second opinion physician, Dr. Rawcliffe, who determined that appellant had no employment-related

¹ Appellant worked on light duty for various periods, beginning in July 1995. She stopped work on July 26, 1996.

condition or disability.² The Office referred appellant to Dr. Anthony Pollock, a Board-certified orthopedic surgeon, for an impartial medical examination on November 21, 1997.

In a report dated February 5, 1998, Dr. Pollock reviewed appellant's history of injury and performed a physical examination. He stated that he believed that appellant sustained some overuse syndromes affecting her upper extremities, back and neck. Dr. Pollock stated that appellant was capable of returning to the modified work. He noted that appellant's complaints of pain of the thoracic spine were subjective and typical of someone suffering from fibromyositis.

The Office requested a supplemental report on February 19, 1998 addressing whether appellant had a work-related medical condition and diagnosis of any ongoing nonwork-related condition. On February 25, 1998 Dr. Pollack responded that appellant "may have some degree of fibromyosistis or something of this nature, but this is very difficult to diagnose exactly in my opinion. I cannot comment on any nonwork-related condition that she has.... The limitations she has, she should continue on. She is perfectly capable of return to this light-duty job."

When the Office secures an opinion from an impartial medical specialist and the opinion of the specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report. However, when the impartial medical specialist's statement of clarification or elaboration is not forthcoming or if the physician is unable to clarify or elaborate on his original report or if the supplemental report is also vague, speculative or lacks rationale, the Office must refer appellant to a second impartial medical specialist for a rationalized medical report on the issue in question.³ Thus, the Office properly referred appellant to Dr. Eugene E. Kaufman, a Board-certified orthopedic surgeon, to resolve the existing conflict of medical opinion evidence.

In a report dated September 30, 1998, Dr. Kaufman reviewed appellant's history of injury and medical records. He performed a physical examination and concluded:

"After thorough review of the voluminous records and thorough physical examination it is my opinion that this woman has very little disability, other than her very asthenic build which I do not think will allow her to do anything more than light to moderate activities, as far as working is concerned. I can really find no significant residua of strains, sprains, or other complaints that she has demonstrated over the years. Physical examination reveals no significant physical defects, other than mild tenderness over the sacroiliac joint, which I mentioned and I would not consider this to be anything that is going to require any kind of specific intervention."

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

² Section 8123(a) of the Federal Employees' Compensation Act, provides, "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." 5 U.S.C. §§ 8101-8193, 8123(a).

³ *Terrance R. Stath*, 45 ECAB 412, 420 (1994).

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 Board finds that Dr. Kaufman's well-rationalized medical report is entitled to the weight of the medical evidence as it provided a proper history of injury and detailed physical findings and explained why appellant's accepted employment-related conditions and disability had ended. Although he stated that appellant should not perform the duties of a full-duty distribution clerk, Dr. Kaufman attributed this finding to appellant's body type rather than to a specific employment-related condition.

Appellant submitted an additional report from Dr. Kutilek dated February 20, 1999, in support of her March 31, 1999 request for reconsideration. Dr. Kutilek disagreed with Dr. Kaufman's report and stated that appellant had residual problems involving her sacroiliac joint, upper back, neck and shoulder which were related to her employment. Dr. Kutilek provided diagnoses of right sacroiliac subluxation -- improved; recurrent lumbosacral strain -- improved; recurrent cervicothoracic strain -- improved; residual cervico -- thoracic somatic dysfunction; residual lumbosacral somatic dysfunction; unstable right wrist -- resolved; and bilateral plantar arch strain with metatarsalgia -- resolved.

Dr. Kutilek did not provide detailed physical findings or medical rationale in support of his opinion that appellant was still disabled as a result of her employment. Because Dr. Kutilek was on one side of the conflict that Dr. Kaufman resolved, the additional report from Dr. Kutilek is insufficient to overcome the weight accorded Dr. Kaufman's report as the impartial medical specialist or to create a new conflict with it.⁵

The Board further finds that appellant has not established intermittent periods of disability from May 31, 1996 to March 6, 1997 and a permanent impairment for schedule award purposes.

Appellant filed a claim for compensation on June 18, 1997 requesting wage-loss compensation from May 31, 1996 to March 6, 1997. The Office requested that Dr. Kutilek provide objective findings and medical rationale in support of appellant's claimed total disability.⁶ The only medical evidence addressing periods of disability is the June 26, 1997 form report indicating that appellant was totally disabled from May 31, 1996. This report does not provide a rationalized medical opinion explaining why appellant was unable to work on the dates in question. Furthermore, the record indicates that Dr. Kutilek removed appellant from work on July 26, 1996 not May 31, 1996. As appellant has failed to provide the necessary medical evidence supporting specific periods of disability, the Office properly denied her claim.

⁴ *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

⁵ *Dorothy Sidwell*, 41 ECAB 857, 874 (1990).

⁶ The Board notes that the issue of disability after November 6, 1996 has already been addressed in this decision.

Appellant also requested a schedule award by claim for compensation dated July 1, 1997. By decision dated August 2, 1999, the Office found that appellant had not established a permanent impairment for schedule award purposes.

Under section 8107 of the Act⁷ and section 10.304 of the implementing federal regulations,⁸ schedule awards are payable for permanent impairment of specified body members, functions or organs.

Dr. Kutilek indicates that appellant's wrist and foot conditions have resolved, but does not find continued impairment of a schedule member. Although Dr. Kutilek mentions appellant's shoulder condition, he does not provide a diagnosis of a shoulder condition. A schedule award is not payable for a member, function or organ of the body not specified in the Act or in the implementing regulations. As neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back, no claimant is entitled to such an award.⁹ Furthermore, Dr. Kaufman, the impartial medical examiner, opined that appellant did not have any medical residuals due to her accepted employment injuries. As appellant has no permanent impairment, she is not entitled to a schedule award.

The decisions of the Office of Workers' Compensation Programs dated August 2 and June 23, 1999 and October 30, 1998 are hereby affirmed.

Dated, Washington, DC
December 12, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.304.

⁹ *George E. Williams*, 44 ECAB 530, 533 (1993).