

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONNA M. CARBONETTO and U.S. POSTAL SERVICE,
POST OFFICE, Rocky Point, N.Y.

*Docket No. 96-2650; Submitted on the Record;
Issued November 4, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits effective December 10, 1995.

In the present case, the Office accepted that appellant sustained a lumbosacral sprain and disc herniation at the L4-5 intervertebral disc. Appellant sustained her work-related employment injury on June 12, 1992 and has not worked since June 13, 1992. Appellant received temporary total disability benefits.

By decision dated November 14, 1995, the Office terminated appellant's compensation benefits effective December 10, 1995, stating that the medical evidence established that the residuals of the lumbosacral sprain and L4-5 intervertebral disc herniation had resolved.

In a report dated July 21, 1994, appellant's treating physician, Dr. Jacob M. Lehman, a Board-certified orthopedic surgeon, considered appellant's history of injury, performed a physical examination and reviewed an August 31, 1992 magnetic resonance imaging (MRI) scan showing a desiccated herniated disc at L4-5 and a September 22, 1993 MRI scan showing a desiccated herniated disc at L4-5, an exiting nerve root on the left at that level and a bulging disc at L5-S1 with a grade I spondylolisthesis. He stated that appellant's diagnosis, symptomatology and disability were totally compatible with the injury sustained on June 12, 1992 as in the history given and that the injury was the competent producing cause of her back pain, leg pain and neuromuscular disability to the back and legs. Dr. Lehman stated that appellant was totally disabled. In correspondence received by the Office on March 3, 1995, Dr. Lehman subsequently approved a job with the employing establishment involving part-time work.

In a report dated March 3, 1995, Dr. Shlomo Piontkowski, a Board-certified orthopedic surgeon and claimant's other treating physician, considered appellant's history of injury, performed a physical examination, reviewed the September 22, 1993 MRI scan and the nerve conduction and electromyogram (EMG) studies of appellant's left lower extremities which were

normal. He diagnosed low back derangement, sciatica, herniated disc, spondylolisthesis and probably spondylolysis at L4-5. In a report dated March 24, 1995, Dr. Pionkowski additionally reviewed a computerized axial tomography (CAT) scan showing degenerative disc with herniation and spondylolysis. He opined that appellant was totally disabled.

The Office subsequently referred appellant to Dr. Edmund A.C. Stewart, a Board-certified orthopedic surgeon, and Dr. Robert G. Roth, a Board-certified psychiatrist and neurologist, for a second opinion. In a report dated January 5, 1995, based on the history of injury, a review of the August 31, 1992 and September 1993 MRI scans and a physical examination, Dr. Stewart diagnosed a herniated disc at L4-5. He opined that appellant was totally disabled and that the July 12, 1992 employment injury was the direct cause of her condition.

In a report dated January 12, 1995, Dr. Roth considered appellant's history of injury, reviewed the August 29, 1992 and September 20, 1993 MRI scans which he opined showed a mild L4-5 bulge, without impingement upon nerve tissue. He noted that a myelogram was done by Dr. Daniel Cohen, a Board-certified psychiatrist and neurologist, in approximately October 1993 which failed to confirm any sort of disc herniation and showed a bulging disc at L4-5. Dr. Roth found on physical examination that appellant had a negative straight leg raising and inconsistent decreased pain in the right lateral leg and the left posterior leg. He concluded that there was nothing wrong with appellant and that appellant was malingering. Dr. Roth stated that appellant's diffuse weakness of the lower extremities did not come from disc disease, appellant's reflexes were normal and appellant had "essentially" normal pain sensation. He stated that the MRI scan did not show any significant pathology. Dr. Roth stated that a bulging disc such as appellant had without impingement upon neural structures was asymptomatic and was not secondary to a job-related accident but was a normal degenerative change that occurred in a very large proportion of the population. He opined that appellant was never disabled from work and could walk and perform normally.

To resolve the conflict between the medical opinions of Dr. Roth and Dr. Lehman on the issue of causal relationship and ongoing disability, the Office referred appellant to an impartial medical specialist, Dr. Howard B. Reiser, a Board-certified psychiatrist and neurologist. In a report dated August 8, 1995, Dr. Reiser considered appellant's history of injury, performed a physical examination, and reviewed the results of a February 27, 1995 CAT scan which "reportedly" revealed degenerative disc disease with large posterior herniations at L4-5 and L5-S1 with impingement of the nerve roots as well as a small herniation at L3-4 and spondylolysis of L4-5. He also reviewed the EMG and nerve conduction studies and a January 12, 1993 myelogram and CAT scan which showed, *inter alia*, mild diffuse disc bulging with hypertrophy of the ligamentum flavum resulting in mild canal stenosis at both L3-4 and L4-5. Regarding some of his physical findings, he stated that appellant reported diminished response to pin sensation on the lateral aspects of the feet and the lateral toes, and that if this was a dermatomal finding, it would suggest S1 nerve root involvement but if the S1 nerve roots were involved, the ankle jerks would be diminished which they were not. He concluded that appellant's ongoing symptoms did not appear to be neurologically based and there was no evidence of an objective ongoing causally related neurological disorder. Dr. Reiser opined that neurologically, appellant should be able to return to gainful employment.

On March 5, 1996 appellant requested reconsideration of the Office's decision and submitted additional medical evidence. In a report dated January 4, 1996, Dr. Piontkowski considered appellant's history of injury, performed a physical examination, reviewed diagnostic tests he had performed including an x-ray, and MRI and CAT scans. He opined that appellant was totally disabled due to the severely herniated disc of the lumbosacral spine. He stated that appellant had a chronic low back problem and was a candidate for either surgery or epidural steroid injections. Further, Dr. Piontkowski stated that appellant was unable to work and her injuries were a direct result of the June 12, 1992 employment injury.

Appellant also submitted the medical reports of Dr. Eric P. Kane, a Board-certified orthopedic surgeon, dated July 23, 1993, of Dr. Daniel H. Cohen, Board-certified in psychiatry and neurology, dated October 20, 1993, of Dr. Stewart dated January 5, 1993, and a disability note dated March 13, 1995 from Dr. Hugh Packer, stating that appellant was unable to work. In his report dated July 23, 1993, Dr. Kane considered appellant's history of injury, performed a physical examination and opined that appellant sustained a significant back injury on June 12, 1992 with subsequent herniated lumbar disc and that she was still symptomatic as a result of that condition. He stated that appellant was totally disabled. In his October 20, 1993 report, Dr. Cohen considered appellant's history of injury, performed a physical examination, and noted that an MRI scan showed disc herniation at L4-5 but a myelogram was performed which failed to confirm the disc herniation and only showed a bulging disc. He opined possible herniated lumbar disc with severe myofascial pain, significant mechanical findings including a positive straight leg raising and diffuse lumbosacral palpation tenderness, and stated that there was no objective neurological deficit. Dr. Cohen stated that appellant was totally disabled and her condition was causally related to the June 12, 1992 employment injury.

By memorandum dated April 5, 1996, the Office noted that appellant had been sent to Dr. Reiser, a neurologist, to resolve the conflict in the medical evidence as to whether appellant continued to be disabled due to a herniated disc based on the diagnostics tests consisting of an MRI scan and an EMG and nerve conduction study, and requested that the district medical adviser determine whether a neurologist was the appropriate specialist in the case. On April 5, 1996 the district medical adviser stated that appellant's symptoms clearly fell with greater weight toward a neurological pathology.

By decision dated June 18, 1996, the Office denied appellant's reconsideration request.

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.¹ The Office's burden of proof includes the necessity of furnishing rationalized medical evidence based on a proper factual and medical background.²

In the present case, in his July 21, 1994 report, Dr. Lehman opined that appellant had a desiccated herniated disc at L4-5, that appellant was totally disabled and the condition was due to the June 12, 1992 employment injury. In a duty status report dated December 5, 1995 (Form CA-17), Dr. Lehman indicated that appellant could perform part-time work with limited standing, walking and bending. In his March 3, 1995 report, Dr. Piontkowski diagnosed low back derangement, sciatica, herniated disc and spondylolisthesis and probably spondylolysis at L4-5. In his March 24, 1995 report, he additionally diagnosed degenerative disc with herniation and spondylolysis and opined that appellant was totally disabled.

The Office subsequently referred appellant to the second opinion physicians, Dr. Stewart and Dr. Roth. In his January 5, 1995 report, Dr. Stewart diagnosed a herniated disc at L4-5, opined that appellant was totally disabled and that the June 12, 1992 employment injury was the direct cause of her condition. In his January 12, 1995 report, Dr. Roth opined that there was nothing wrong with appellant and that appellant was malingering. He stated that the MRI scan did not show any significant pathology. He opined that appellant was never disabled from work and could walk and perform normally.

To resolve the conflict between Dr. Lehman's opinion that appellant could work part time and Dr. Roth's opinion that appellant was not disabled, the Office referred appellant to Dr. Reiser, a Board-certified neurologist and an impartial medical specialist. In his August 8, 1995 report, Dr. Reiser considered appellant's history, performed a physical examination reviewed the results of a February 27, 1995 CAT scan, the December 30, 1994 nerve conduction studies and a January 12, 1993 myelogram and CAT scan. He concluded that appellant's ongoing symptoms did not appear to be neurologically based, that there was no evidence of objective ongoing symptoms causally related to neurological disorder and that appellant could return to gainful employment.

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.³ The Board finds that Dr. Reiser's opinion is sufficiently well rationalized in establishing that appellant recovered from her June 12, 1992 employment injury and is based on a proper factual background. As an impartial medical specialist, Dr. Reiser's opinion constitutes the weight of the evidence. Further, as there was a conflict in the medical evidence between the opinions of appellant's treating physicians, Dr. Lehman and Dr. Piontkowski that appellant was totally disabled and Dr. Roth's opinion that appellant was not disabled, it was appropriate for the Office to refer appellant to an impartial medical specialist to resolve the conflict. The district medical adviser's April 5, 1996 note

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

² *Larry Warner*, 43 ECAB 1027, 1032 (1992); *see Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

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

supports that a neurologist was the appropriate medical specialist to whom appellant should be referred.

Although appellant submitted additional evidence, it is not enough to outweigh Dr. Reiser's opinion. Dr. Piontkowski's March 5, 1996 report in which he opined that appellant was totally disabled due to the severely herniated disc of the lumbosacral spine and that appellant's injuries were the direct result of the June 12, 1992 employment injury does not add any medical rationale that had not been previously considered. Further, Dr. Packer's March 13, 1995 disability note does not address the cause of appellant's disability and therefore is not relevant. Dr. Kane's July 23, 1993 report and Dr. Cohen's October 20, 1993 report are not relevant since they are more than two years old.

The decisions of the Office of Workers' Compensation Programs dated June 18, 1996 and November 14, 1995 are hereby affirmed.

Dated, Washington, D.C.
November 4, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member