

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PHILLYS M. MASON and U.S. POSTAL SERVICE,
POST OFFICE, Washington, D.C.

*Docket No. 97-2476; Submitted on the Record;
Issued July 15, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective October 13, 1996.

On April 19, 1990 appellant, then a 45-year-old flat sorter machine operator, filed an occupational disease claim, alleging that she sustained tendinitis of the wrists beginning March 15, 1990. The Office accepted appellant's claim for tenosynovitis of the left and right wrist. Appellant worked intermittently until December 10, 1990. She briefly returned to work for four hours a day beginning October 23, 1991. She received appropriate compensation for all periods of disability. On May 23, 1993 the Office proposed termination of appellant's compensation based on findings of an impartial medical examiner. However, appellant continued to receive compensation. In a letter dated June 27, 1996, the Office again proposed termination of appellant's compensation on the grounds that she had no residuals of her accepted employment injuries. In a decision dated September 17, 1996, the Office terminated appellant's compensation effective October 13, 1996. By decision dated June 18, 1997 and finalized June 19, 1997, an Office hearing representative affirmed the September 17, 1996 decision of the Office.

The Board has duly reviewed the entire case record on appeal and finds that the Office properly terminated her compensation effective October 13, 1996.¹

¹ The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. As appellant filed her appeal with the Board on July 23, 1997, the only decisions before the Board are the Office's September 17, 1996 and June 19, 1997 decisions; *see* 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

Under the Federal Employees' Compensation Act,² once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of compensation.³ After the Office determines that an employee has a disability causally related to his or her employment, the Office may not terminate compensation without establishing that its original determination was erroneous or that the disability has ceased or is no longer related to the employment injury.⁴

The fact that the Office accepts appellant's claim for a specified period of disability does not shift the burden of proof to appellant to show that he or she is still disabled. The burden is on the Office to demonstrate an absence of employment-related disability in the period subsequent to the date when compensation is terminated or modified.⁵ Therefore, the Office must establish that appellant's condition was no longer aggravated by employment factors after October 13, 1996, and the Office's burden includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁶

In the present case, the Office initially developed evidence relevant to termination in 1993 to 1994 when it properly declared a conflict in the medical evidence between the reports of Dr. Earl C. Mills, appellant's treating physician and a neurosurgeon, and the report of Dr. Willie Thompson, a Board-certified orthopedic surgeon and Office referral physician, regarding whether appellant had any residuals of her accepted employment injury. Appellant together with her medical record and statement of accepted facts was referred to Dr. John B. Cohen, a Board-certified orthopedic surgeon, for an impartial medical examination and report. In a report dated May 27, 1994, Dr. Cohen found that appellant had no anatomical basis for her complaints and that there was no objective evidence to support a diagnosis of tenosynovitis. He recommended that appellant undergo a short work-hardening program and return to work. Appellant continued to submit medical reports by Dr. Mills, who diagnosed cervical radiculopathy, cervical pain syndrome and bilateral carpal tunnel syndrome. While he noted that appellant had seen employing establishment physicians who believed appellant's symptoms were not supported by objective evidence, Dr. Mills did not provide any conclusions regarding what objective evidence he found to support his diagnoses. In a report dated March 3, 1997, he reiterated his diagnoses and added herniated cervical discs at the C5 to C6 level, as revealed on a magnetic resonance imaging scan. Dr. Mills concluded that appellant's symptoms continued to disable her from work. Appellant was referred for a new second opinion examination by Dr. Louis Levitt, a Board-certified orthopedic surgeon, to assess her current disability status. In a report dated April 23, 1996, Dr. Levitt concluded that there was no active pathology based on negative Phalen's and Tinel's testing, a normal neurovascular examination, full range of motion in

² 5 U.S.C. § 8101 *et seq.*

³ *William Kandel*, 43 ECAB 1011 (1992).

⁴ *Carl D. Johnson*, 46 ECAB 804 (1995).

⁵ *Dawn Sweazey*, 44 ECAB 824 (1993).

⁶ *Mary Lou Barragy*, 46 ECAB 781 (1995).

appellant's shoulder, elbow and wrist and normal upper extremity muscles. He indicated that appellant could return to her date-of-injury employment.

Initially the Board notes that the impartial medical examination and report by Dr. Cohen was entitled to special weight. In situations where there exists opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of the resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁷ The Board has carefully reviewed the opinion of Dr. Cohen and finds that it had sufficient probative value, regarding the relevant issue in the present case, to be accorded such special weight. The Board notes that Dr. Cohen was selected to resolve the conflict in medical opinions between Dr. Mills and Dr. Thompson. For this reason, the subsequent reports of Dr. Mills which were essentially repetitive of his prior reports are insufficient to outweigh the special weight given the report by Dr. Cohen as Dr. Mills had participated in the creation of the medical conflict which was referred to Dr. Cohen for resolution.⁸ As appellant's compensation benefits were not terminated based on the report of Dr. Cohen in a timely fashion, the Office properly referred appellant to Dr. Levitt for a contemporaneous medical report. This well-reasoned and rationalized medical report by Dr. Levitt constitutes the weight of the medical evidence. The Board notes that the reports by Dr. Mills do not provide sufficient reasoning to explain his conclusions that appellant had continuing disability that was causally related to her accepted employment injury and lack objective evidence to support his opinion whereas Dr. Levitt's opinion is fully supported by his physical and objective findings. Moreover, Dr. Mills had not explained how the diagnosed conditions which were not accepted by the Office are causally related to appellant's accepted employment injury of bilateral tenosynovitis. The Office has met its burden of proof in terminating appellant's compensation effective October 13, 1996 based on the opinion of Dr. Levitt as corroborated by the prior report of Dr. Cohen.

⁷ *Jack R. Smith*, 41 ECAB 691 (1990); *James P. Roberts*, 31 ECAB 1010 (1980).

⁸ *Josephine L. Bass*, 43 ECAB 929 (1992); see *Dorothy Sidwell*, 41 ECAB 857 (1990).

The decisions of the Office of Workers' Compensation Programs dated June 18, 1997 and finalized June 19, 1997 and September 17, 1996 are hereby affirmed.

Dated, Washington, D.C.
July 15, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member