

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BEATRICE WARD and U.S. POSTAL SERVICE,
POST OFFICE, Jamaica, NY

*Docket No. 98-2542; Oral Argument Held September 16, 1999;
Issued January 6, 2000*

Appearances: Beatrice Ward, *pro se*; Cornelius S. Donoghue, Jr., Esq.,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs has met its burden of proof to terminate appellant's compensation benefits effective June 14, 1996; and (2) whether appellant has met her burden of proof to establish that she is entitled to continuing compensation benefits on or after June 14, 1996.

On August 23, 1995 appellant, then a 50-year-old postal clerk, filed a claim for traumatic injury (Form CA-1) alleging that on August 20, 1995 she injured her right leg while lifting bags of mail in the performance of duty. On December 12, 1995 the Office accepted appellant's claim for a right thigh strain. Appellant did not stop work. Subsequently, on November 17 and November 26, 1995 appellant filed claims for recurrence of disability, which were also accepted by the Office. Appellant received continuation of pay for periods of lost time from work from November 18, 1995 through January 5, 1996. Appellant was paid compensation for total wage loss beginning January 6, 1996. Appellant has not returned to work.

In support of her claim to continuing compensation, appellant submitted periodic reports from her treating physician, Dr. Michael J. Katz, a Board-certified orthopedic surgeon, who diagnosed right quadriceps atrophy and a sprained right knee with retropatellar pain. Dr. Katz opined that appellant remained totally disabled due to the effects of her employment injury and needed magnetic resonance imaging (MRI) performed on her right knee.

On December 29, 1995 the Office referred appellant to Dr. Henry Marano, a specialist in orthopedic surgery, for a second opinion evaluation. In his report dated January 21, 1996, Dr. Marano diagnosed appellant's condition as a right thigh sprain, causally related to her employment accident. He recommended that appellant be evaluated by a neurologist, but opined that she could return to work on a light-duty basis, eight hours a day.

On March 22, 1996 the Office referred appellant for a second opinion evaluation by Dr. Alfred C. Bannerman, a Board-certified neurologist. In his report dated April 8, 1996, Dr. Bannerman concluded that appellant had no evidence of radiculopathy or peripheral neuropathy, that there was no ongoing period of disability and that appellant could return to full time, unrestricted occupational duties without limitation and without need for further treatment or therapy.

The Office proposed to terminate appellant's compensation benefits on May 13, 1996. By decision dated June 14, 1996, the Office terminated appellant's compensation benefits effective that date, finding that the weight of the medical evidence, represented by the well-rationalized report of Dr. Bannerman, established that appellant had no continuing disability as a result of her August 20, 1995 employment injury.

Appellant requested an oral hearing, which was held on December 18, 1996. In support of her claim, appellant submitted a September 11, 1996 report from her new treating physician, Dr. Peteris E. Dzenis, a Board-certified orthopedic surgeon. In his report dated January 9, 1997, Dr. Dzenis stated that appellant first came under his care on July 8, 1996 for an employment-related injury to her right knee. He added that an MRI performed on July 8, 1996 revealed tearing of the medial and lateral meniscus of the right knee and concluded that her August 20, 1995 employment accident was the cause of her condition.

In a decision finalized on February 19, 1997, an Office hearing representative affirmed the Office's June 14, 1996 decision terminating appellant's benefits on the grounds that the weight of the medical evidence continued to rest with the well-rationalized report of Dr. Bannerman. The hearing representative specifically found that the opinions expressed by Dr. Katz and Dr. Dzenis were unexplained and unsupported by objective findings and, therefore, were insufficient to equal or outweigh the opinion of Dr. Bannerman.

By letter dated February 18, 1998, appellant requested reconsideration and submitted additional evidence in support of her request, including an additional report from Dr. Dzenis. In his February 13, 1998 report, Dr. Dzenis attempted to provide the medical rationale and objective findings lacking in his earlier report. He emphasized that he had reviewed appellant's prior medical records in preparing his report and was aware of both the mechanism of her injury, lifting heavy mail bags and of her work history subsequent to the injury. Dr. Dzenis further explained his findings as follows:

“Upon my initial examination on July 8, 1996 she demonstrated a right knee effusion with medial joint line tenderness as well as a positive McMurray[‘s] test for the medial meniscus. Radiographic evaluation revealed a right knee effusion. An MRI evaluation of her right knee performed on July 8, 1996 revealed an “increased oblique signal within the posterior horn and body of the medial meniscus.” The information provided by the MRI as well as the clinical findings are consistent with the finding of a torn medial meniscus of the right knee.

“The mechanism of causation of a meniscal tear consists of axial loading coupled with a twisting injury during which there is a mismatch between the femoral condyle and the tibial plateau with the resultant entrapment and tearing of the

meniscus. Appellant's original injury is entirely consistent with this mechanism and was the causative factor of her knee injury. As a result of this her mechanics of gait will be affected and manifestations of these consist of muscle cramping, spasms, muscle atrophy as well as pain.

"As the torn meniscal fragment moves within its substance there [will] occur periods of reexacerbation of these symptoms. The meniscal injury does not produce nerve injury and, therefore, there will not be any radicular signs or neurological deficits and an expected normal EMG [electromyography] and nerve conduction study will be demonstrated.

"Due to this injury [appellant] is totally disabled from performing her occupation as a clerk due to the physical limitations which she is experiencing. She is not able to perform twisting motions, especially when lifting weight. She is also restricted from getting up from a sitting position.

"In order to return her to the workplace in her previous position as a clerk she will require an operative arthroscopy of her right knee with an associated meniscectomy. An anticipated excellent early recovery must be tempered with the possibility of later degenerative osteoarthritis. Depending on the amount of meniscus removed a 5 to 15 percent permanent physical impairment will be present. Unless she undergoes the proposed procedure she will not be unable to return in her previous capacity."

In a decision dated May 20, 1998, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant review of the prior decision. With respect to Dr. Dzenis' supplemental report, the Office specifically found that despite his attempt to remedy the deficiencies contained in his earlier report, it still "cannot be determined from his supplemental report which specific 'prior records' were reviewed; what he means by being 'aware of the causative effect of the mechanism of the August 20, 1995 injury' and what her work history is as he knows it."

The Board initially finds that in its May 20, 1998 decision, the Office exercised its discretionary authority under 5 U.S.C. § 8128 to reopen appellant's claim for further merit review.

Section 8128(a) does not require the Office to review final decisions of the Office awarding or denying compensation. This section vests the Office with the discretionary authority to determine whether it will review a claim following the issuance of a final decision by the Office.¹ Although it is a matter of discretion on the part of the Office as to whether to reopen a case for further consideration under 5 U.S.C. § 8128(a),² the Office, through regulations, has placed limitations on the exercise of that discretion with respect to a claimant's request for reconsideration. By these regulations, the Office has stated that it will reopen a

¹ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

² *See Charles E. White*, 24 ECAB 85 (1972).

claimant's case and review the case on its merits whenever the claimant's application for review meets the specific requirements set forth in sections 10.138(b)(1) and 10.138(b)(2) of Title 20 of the Code of Federal Regulations. Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his claim by written request to the Office identifying the decision and the specific issue(s) within the decision which claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

“(i) Showing that the Office erroneously applied or interpreted a point of law; or

“(ii) Advancing a point of law or fact not previously considered by the Office; or

“(iii) Submitting relevant and pertinent evidence not previously considered by the Office.”³

Section 10.138(b)(2) provides that any application for review of the merits of a claim, which does not meet at least one of the requirements listed in paragraphs(b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.⁴ Where a claimant fails to submit relevant evidence not previously of record or advance legal contentions not previously considered, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128 of the Federal Employees' Compensation Act.⁵

As noted above, in its May 20, 1998 decision, the Office stated that the February 13, 1998 report of Dr. Dzenis is insufficient to meet any of the three requirements noted above and, therefore, insufficient to warrant merit review of the prior decision. The Board finds, however, that the context of the May 20, 1998 decision and accompanying memorandum, indicate that the Office in fact considered the merits of the claim in the decision. For example, the memorandum accompanying the May 20, 1998 decision specifically weighed the probative value of Dr. Dzenis' report and found it insufficiently rationalized and insufficiently explained. The Board finds, therefore, that in its May 20, 1998 decision, the Office exercised its discretionary authority under 5 U.S.C. § 8128 to reopen appellant's claim for merit review.

As the Board finds that the Office's May 20, 1998 decision constitutes a decision on the merits and as appellant, in a letter postmarked August 13, 1998, appealed to the Board within one year of the decision dated May 20, 1998, the Board will consider the merits of appellant's claim.

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective June 14, 1996.

³ 20 C.F.R. § 10.138(b)(1).

⁴ 20 C.F.R. § 10.138(b)(2).

⁵ *Joseph W. Baxter*, 36 ECAB 228 (1984).

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.⁶ 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.⁷ Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁸ To terminate authorization or medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.⁹

In this case, Dr. Bannerman, the Office referral physician, upon whom the Office principally relied in terminating appellant's benefits, provided detailed reports relying on the statement of accepted facts, as well as appellant's personal history and medical records, in concluding that appellant had no evidence of radiculopathy or peripheral neuropathy, that there was no ongoing period of disability and that appellant could return to full time, unrestricted occupational duties without limitation and without need for further treatment or therapy. By contrast, Dr. Katz, who opined that appellant remained totally disabled as a result of her employment-related right leg injury, failed to explain how appellant's disability was causally related to the August 20, 1995 right thigh strain and further described no physical findings to support any continuing disability. Finally, the opinion of Dr. Dzenis, as expressed in his January 9, 1997 report, is also insufficiently rationalized to support a finding of employment-related disability in that Dr. Dzenis simply stated his conclusion that appellant had a disabling knee injury which is causally related to her August 20, 1995 employment accident, but did not offer a medical explanation as to how the employment activity caused the diagnosed meniscal tear in appellant's right knee. The Board has held that in assessing medical evidence, the number of physicians supporting one position or another is not controlling; the weight of the evidence is determined by its reliability, its probative value and its convincing quality. The opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion are factors which enter into this evaluation.¹⁰ As the weight of the rationalized medical evidence before the Office at the time of its June 14, 1996 decision establishes that appellant's employment-related disability had ceased and as the record contained at that time, no rationalized contradictory evidence, the Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective June 14, 1996.

⁶ *Lawrence D. Price*, 47 ECAB 120 (1995).

⁷ *Id.*

⁸ *Furman G. Peake*, 41 ECAB 361, 364 (1990).

⁹ *Id.*

¹⁰ *Connie Johns*, 44 ECAB 560 (1993).

The Board further finds this case is not in posture for a decision on the issue of whether appellant has established any continuing disability or residuals after June 14, 1996 causally related to her accepted employment injury.

As the Office met its burden of proof to terminate appellant's compensation benefits, the burden shifts to appellant to establish that she has a disability causally related to her accepted employment injury.¹¹ To establish a causal relationship between the condition, as well as any disability claimed and the employment injury, the employee must submit rationalized medical opinion evidence, based on a complete factual background, supporting such a causal relationship. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. Again, the weight of the medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.¹²

In support of her February 18, 1998 request for reconsideration, appellant submitted additional medical evidence, including the February 13, 1998 report from Dr. Dzenis, a Board-certified orthopedic surgeon, discussed in full above. In this report, Dr. Dzenis fully discussed the results of his examination and testing and diagnosed a meniscal tear causally related to appellant's August 20, 1995 employment accident. He explained in detail how the type of lifting performed by appellant on the date of injury would have caused such a tear and further explained why such an injury would not be revealed by the type of neurological testing administered by the Office second opinion physician, Dr. Bannerman. Finally, he explained that appellant's diagnosed condition, which prevents her from performing any twisting motions, especially while lifting, renders her totally disabled from performing her regular employment duties.

The Board finds that this case is not in posture for decision as there is now a conflict in medical evidence with respect to whether appellant suffers from any residuals or disability of her accepted right leg injury. Dr. Bannerman, a Board-certified neurologist, who examined appellant on behalf of the Office, opined that appellant has no ongoing period of disability and can return to full time, unrestricted occupational duties. Dr. Dzenis, a Board-certified orthopedic surgeon and appellant's treating physician, opined in his February 18, 1998 report, that appellant remains totally disabled as a result of her employment-related right knee injury. The Act, at 5 U.S.C. § 8123(a), in pertinent part, provides:

“If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a

¹¹ *George Servetas*, 43 ECAB 424, 430 (1992).

¹² *Connie Johns*, *supra* note 10; *James Mack*, 43 ECAB 321 (1991).

third physician who shall make an examination.”¹³ Consequently, the case will be remanded so that the Office may refer appellant, together with a statement of accepted facts, questions to be answered and the complete case record, to an appropriate Board-certified specialist for an impartial medical referee examination and a rationalized medical opinion to resolve the medical conflict regarding this issue.¹⁴

Therefore, the decision of the Office of Workers’ Compensation Programs dated May 20, 1998 is set aside, the February 19, 1997 decision terminating appellant’s compensation benefits effective June 14, 1996 is affirmed, and the case is remanded for further action in accordance with this decision and order of the Board.

Dated, Washington, D.C.
January 6, 2000

Michael J. Walsh
Chairman

George E. Rivers
Member

Bradley T. Knott
Alternate Member

¹³ 5 U.S.C. § 8123(a); *Esther Velasquez*, 45 ECAB 249, 252-53 (1993).

¹⁴ *Kathryn Haggerty*, 45 ECAB 383 (1994); *Carol A. Dixon*, 43 ECAB 1065, 1071 (1992).