

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LORRAINE DRAKE and U.S. POSTAL SERVICE,
POST OFFICE, Philadelphia, PA

*Docket No. 02-1885; Submitted on the Record;
Issued May 28, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation for her accepted condition of lumbosacral strain.

On June 26, 1989 appellant, then a 49-year-old letter carrier, fell on uneven pavement and sustained injuries to her left ankle and right knee. The Office accepted appellant's claim for left ankle sprain, right knee contusion and lumbosacral sprain. Arthroscopic surgery was later approved. Appellant received total temporary disability until May 7, 1990 when she returned to sedentary duty. Appellant stopped work again on June 30, 1991 and has not returned.

This is the second time this case has been before the Board.¹ The facts and findings of the previous decision are hereby incorporated. In a June 1, 2000 decision, the Board affirmed that appellant's left ankle and right knee conditions had resolved. The Board also reversed the Office decision terminating appellant's compensation for her back condition; finding the Office improperly relied on Dr. Noubar Didizian, a Board-certified orthopedic surgeon, as an impartial examiner on the issue of appellant's back-related disability. The Board found that Dr. Didizian, had been selected as an impartial examiner to resolve a conflict in the medical evidence related to the level of appellant's work-related disability, not whether or not appellant continued to have a work-related back disability. In addition the Board remanded the case for further development on whether appellant had any residual disability to her knee as a result of the authorized surgical procedures.

In a June 27, 2000 report, Dr. Arnold S. Lincow, a Board-certified osteopath, diagnosed appellant with a large herniated disc at L4-S1 with unresolved radiculopathy, reflex sympathetic dystrophy with post-traumatic myofascial pain syndrome, internal derangement of the right knee with traumatic hermarthrosis, status post arthrocentesis right knee, post-traumatic myofascial pain syndrome and exacerbation of the right knee with internal derangement of the right knee

¹ Docket No. 98-1471 (issued June 1, 2000).

with myofascitis. Dr. Lincow further opined that based upon a reasonable degree of medical certainty, appellant has developed chronic complex syndrome and that her medical conditions were causally related to the accepted injuries. He concluded that appellant would never return to her date-of-injury job and at that time she was totally disabled.

In a July 24, 2000 letter, the Office referred appellant to Dr. Randall N. Smith, a Board-certified orthopedic surgeon, to resolve the conflict in the medical evidence between Dr. Didizian, who served as the Office referral physician and appellant's attending physicians, Drs. Lincow and Arthur M. Lerner, a physician specializing in internal medicine. The conflict was whether appellant continued to have a work-related back disability.

In an August 2, 2000 report, Dr. Lincow wrote that appellant's condition had stabilized but she still had complaints of palpitations, headaches, low back and right knee pain. She was being treated with a whirlpool and muscle stimulator and a narcotic opioid analgesic as well as several other medications for pain, spasms, inflammation, anxiety and depression secondary to pain.

In an August 28, 2000 report, Dr. Smith indicated that after a physical examination of appellant and after reviewing her imaging studies and test results, he found that her back problems were degenerative in nature, exacerbated by her obesity and age. Dr. Smith based his opinion on the fact that the radiographic and imaging studies completed just after appellant's fall showed her lumbosacral spine was normal. The abnormalities appeared in later studies, leading Dr. Smith to conclude that they were not related to the accepted fall.

Dr. Smith further opined that appellant's right knee condition was a result of the accepted fall as it led to traumatic chondrolmalacia. He also found the accepted injury damaged appellant's lateral ligaments in her left ankle and produced swelling, discomfort and a mild impairment. He indicated that while her obesity played a significant role in her ankle and knee not responding to treatments and obesity accelerated the degenerative process, the asymmetry in her left ankle and right knee were at least partly a result of the accepted fall. He concluded that appellant had sedentary work restrictions due to the ankle and knee conditions.

In an October 5, 2000 letter, the Office proposed terminating appellant's compensation for her back condition while continuing partial compensation for her knee condition. Appellant was given 30 days to submit evidence opposing the termination. In an October 24, 2000 report, Dr. Lincow's diagnosis included an unresolved post-traumatic surgery of the right knee, medial meniscus with chondromalacia and sprain of the anterior cruciate ligament and unresolved severe left ankle sprain. He opined that appellant's accepted knee and ankle conditions caused her to walk with an altered and abnormal gait, which led to her severe and ongoing low back problems.

In a November 8, 2000 decision, the Office terminated appellant's back-related disability finding the weight of the medical evidence rested with Dr. Smith as the impartial examiner. Regarding the ankle, the Office indicated that previous decisions, including the Board's decision, had concluded that appellant had no further residuals related to appellant's accepted sprained left ankle.

Appellant requested a hearing arguing Dr. Smith's report supports her position that she has ongoing disability related to her ankle and knee conditions. In a July 30, 2001 decision, the hearing representative affirmed the Office decision that appellant's work-related back condition had resolved finding the weight of the medical evidence rested with Dr. Smith as the impartial examiner. The hearing representative dismissed the medical evidence supporting appellant's argument that increased weight and altered gait, both arising subsequent to the accepted injury, were causally related to her back condition; noting that "good administrative practice necessitated these issues be addressed in a separate claim."

The Board finds that the Office improperly terminated appellant's compensation for her accepted condition of lumbosacral strain. Under the Federal Employees' Compensation Act,² once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.³ The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁴ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵

In its June 1, 2000 decision, the Board found a conflict in the medical evidence between appellant's attending physicians, Drs. Lerner and Lincow, both Board-certified physicians and Dr. Didizian, a Board-certified orthopedic surgeon, acting as an Office referral physician, on the issue of the extent of appellant's ongoing disability related to her lumbosacral strain. Dr. Didizian was originally chosen as an impartial examiner, but the Board modified his status when he failed to address the issue in conflict, which was the extent of appellant's impairment due to her lumbosacral strain. In order to resolve the conflict, the Office properly referred appellant, pursuant to section 8123(a) of the Act, to Dr. Smith, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter.⁶

In situations where there exist 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 upon a proper factual background, must be given special weight.⁷

The Board finds that Dr. Smith's report fails to address the issue in conflict and, therefore, is insufficient to meet the Office's burden of proof. In his August 28, 2000 report, Dr. Smith wrote that appellant had no disability related to the accepted lumbosacral strain. In his

² 5 U.S.C. §§ 8101-8193.

³ *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

⁴ *Id.*

⁵ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁶ Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of employee, the Secretary shall appoint third physician who shall make an examination." 5 U.S.C. § 8123(a).

⁷ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

opinion, appellant never sustained a lumbosacral strain. Instead, he found that her degenerative condition, age and obesity caused her back condition. As Dr. Smith failed to address the critical issue his opinion cannot be entitled the special weight of an impartial examiner. Instead, his opinion joins one side of an unresolved conflict.

The July 31, 2001 decision by the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC
May 28, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member