

**United States Department of Labor
Employees' Compensation Appeals Board**

G.K., Appellant)	
)	
and)	Docket No. 09-1222
)	Issued: January 15, 2010
U.S. POSTAL SERVICE, POST OFFICE,)	
Islandia, NY, Employer)	
)	

Appearances:
Paul Kalker, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 7, 2009 appellant filed a timely appeal from the March 5, 2009 merit decision of the Office of Workers' Compensation Programs concerning the termination of her compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office met its burden of proof to terminate appellant's compensation effective March 15, 2009 on the grounds that she had no residuals of her March 1, 1996 employment injury after that date.

FACTUAL HISTORY

The Office accepted that on March 1, 1996 appellant, then a 39-year-old mail sorter, sustained a herniated nucleus pulposus at L5-S1 due to sweeping mail on a flat sorter machine. On March 12, 1996 Dr. Thomas Dowling, an attending Board-certified orthopedic surgeon, performed a discectomy at L5-S1 and laminotomy at L4-5 and L5-S1. The Office paid appellant compensation for periods of disability.

Appellant continued to be treated for her orthopedic problems by Dr. Dowling. On June 9, 2008 Dr. Dowling noted that she continued to complain of lower back pain and right leg numbness. On examination, appellant had paraspinal spasms and tenderness bilaterally and that there was percussive tenderness at L5-S1. Motion was painful during axial extension and axial flexion and the lower extremities were intact to light touch and pinprick in all dermatomes. Dr. Dowling concluded that appellant continued to be totally disabled due to residuals of her March 1, 1996 employment injury.

On August 13, 2008 Dr. Sanford Wert, a Board-certified orthopedic surgeon, who served as an Office referral physician, described appellant's March 1, 1996 employment injury. He advised that the findings of March 11, 1996 magnetic resonance imaging (MRI) scan testing showed degenerative disc disease at L4-5 with a diffuse bulging annulus and midline broad-based disc herniation at L5-S1. Dr. Wert noted that appellant reported lumbosacral spine pain radiating down both legs with numbness of the right leg and foot. He stated that the physical examination revealed symmetrical reflexes, normal motor testing, no atrophy and virtually normal range of motion. Dr. Wert diagnosed aggravation of preexisting degenerative disease of the lumbosacral spine and status post discectomy at L5-S1 and laminotomy at L4-5 and L5-S1. He indicated that the clinical evaluation did not show any evidence of objective symptoms, but elsewhere in his report he stated that, based on the clinical evaluation, it was his impression that appellant had a moderate partial disability with respect to the injuries sustained on March 1, 1996. Dr. Wert further noted that the evidence of record, including the diagnostic testing, showed that on March 1, 1996 appellant sustained a permanent aggravation of the underlying lumbar degenerative disease that still caused objective symptoms.

The Office determined that there was a conflict in the medical opinion between Dr. Dowling and Dr. Wert on the issue of whether appellant continued to have residuals of her March 1, 1996 employment injury. It referred appellant to Dr. Michael J. Katz, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on whether she continued to have residuals of her March 1, 1996 employment injury.

On October 28, 2008 Dr. Katz described appellant's March 1, 1996 employment injury and described her medical treatment since that time. He noted that on August 16, 2008 she had a nonwork-related motorcycle accident which necessitated the amputation of her left leg above the knee. Appellant was awaiting the fitting of a prosthesis for her left leg. Dr. Katz indicated that examination revealed a well-healed low back scar, normal reflexes and sensation in the right leg and an inability to test reflexes and sensation in the left leg due to the amputation. He stated:

“It is apparent that [appellant] is now disabled from the unrelated amputation of August 16, 2008. It is clear that if an individual was capable of riding a motorcycle [sic] should be capable of working as a flat sorter. I personally have not seen individuals who are disabled based on a lumbosacral radiculopathy riding a motorcycle. Riding a motorcycle requires a tremendous amount of capacity to lift, to turn and to maneuver ones body. It is apparent that this individual could ride a motorcycle and was not disabled based on a back injury of 1996. [Appellant's] work[-]related back injury has resolved. Her work[-]related back condition was related by aggravation. There is no further treatment needed

for her back condition on a work[-]related basis. Currently, the claimant does have a total disability based on her amputation of August 16, 2008.”¹

In a January 12, 2009 letter, the Office advised appellant that it proposed to terminate her compensation on the grounds that she no longer had residuals of her March 1, 1996 employment injury. It indicated that the weight of the medical evidence with regard to this matter rested with the well-rationalized opinion of Dr. Katz.

Appellant submitted a January 27, 2009 report in which Dr. Dowling expressed disagreement with Dr. Katz’ opinion and noted that he felt that appellant continued to have disability due to residuals of her March 1, 1996 employment injury.

In a March 5, 2009 decision, the Office terminated appellant’s wage-loss compensation and medical benefits effective March 15, 2009. It again indicated that the opinion of Dr. Katz justified the termination of compensation. The Office noted that the new medical report of Dr. Dowling did not change the fact that the weight of the medical evidence rested with the opinion of Dr. Katz.

LEGAL PRECEDENT

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 Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵

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 the employee, the Secretary shall appoint a third physician who shall make an examination.”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

¹ On November 5, 2008 Dr. Dowling indicated that appellant underwent a left leg amputation. He stated that she was totally disabled from all work.

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 5 U.S.C. § 8123(a).

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

ANALYSIS

The Office accepted that on March 1, 1996 appellant sustained a herniated nucleus pulposus at L5-S1 due to sweeping mail on a flat sorter machine. On March 12, 1996 Dr. Dowling, an attending Board-certified orthopedic surgeon, performed a discectomy at L5-S1 and laminotomy at L4-5 and L5-S1. The Office determined that a June 9, 2008 report of Dr. Dowling and an August 13, 2008 report of Dr. Wert, a Board-certified orthopedic surgeon serving as an Office referral physician, created a conflict in the medical evidence regarding whether appellant continued to have residuals of her March 1, 1996 employment injury. It referred appellant to Dr. Katz, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on whether she continued to have residuals of her March 1, 1996 employment injury.⁸

The Board finds, however, that the Office improperly determined that there was a conflict in the medical opinion between Dr. Dowling and Dr. Wert on the issue of whether appellant continued to have residuals of her March 1, 1996 employment injury.

In a June 9, 2008 report, Dr. Dowling reported appellant's various low back symptoms and concluded that she continued to be totally disabled due to residuals of her March 1, 1996 employment injury. However, the August 13, 2008 report of Dr. Wert does not contain a clear opinion that appellant no longer had residuals of her March 1, 1996 employment injury. He indicated that the clinical evaluation did not show any evidence of objective symptoms, but elsewhere in his report he stated that, based on the clinical evaluation, it was his impression that appellant continued to have a moderate partial disability with respect to the injuries sustained on March 1, 1996. Dr. Wert further noted that the evidence of record, including the diagnostic testing, showed that on March 1, 1996 appellant sustained a permanent aggravation of her underlying lumbar degenerative disease that still caused objective symptoms.⁹

The Office characterized Dr. Katz as an impartial medical specialist and gave special weight to his opinion in reaching its determination that appellant ceased to have residuals of her March 1, 1996 employment injury. However, due to the lack a conflict in the medical evidence at the time of the referral, Dr. Katz actually served as an Office referral physician rather than an impartial medical specialist.

As noted, Dr. Dowling expressed an opinion that appellant continued to have residuals of her March 1, 1996 employment injury.¹⁰ In contrast, Dr. Katz found in his October 28, 2008 report that appellant continued to have residuals of this employment injury. He expressed his belief that appellant's March 1, 1996 injury had resolved and indicated that she ceased to have residuals of this injury. The Board finds the opinion of Dr. Katz, the government physician, forms a new conflict with the opinion of Dr. Dowling, appellant's physician, regarding whether appellant

⁸ See *supra* notes 6 and 7 and accompanying text.

⁹ Dr. West diagnosed aggravation of preexisting degenerative disease of the lumbosacral spine and status post discectomy at L5-S1 and laminotomy at L4-5 and L5-S1. The Board notes that the record does not otherwise contain an opinion of a government physician that creates a conflict with Dr. Dowling's opinion.

¹⁰ Moreover, in a January 27, 2009 report, Dr. Dowling expressed disagreement with Dr. Katz' opinion and noted that he felt that appellant continued to have disability due to residuals of her March 1, 1996 employment injury.

continued to have residuals of her March 1, 1996 employment. The Board further finds that, since there is an outstanding conflict in the medical evidence regarding whether appellant continued to have employment-related residuals, the Office has failed to meet its burden of proof in terminating appellant's benefits effective March 15, 2009.¹¹

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation effective March 15, 2009 on the grounds that she no longer had residuals of her March 1, 1996 employment injury after that date.

ORDER

IT IS HEREBY ORDERED THAT the March 5, 2009 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 15, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

¹¹ See *Gail D. Painton*, 41 ECAB 492, 498 (1990); *Craig M. Crenshaw, Jr.*, 40 ECAB 919, 922-23 (1989).