U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of THERESA PEOPLES and U.S. POSTAL SERVICE,
KEDZIE GRACE STATION, Chicago, Ill.

*Docket No. 96-720; Submitted on the Record;*
*Issued April 7, 1998*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation on the grounds that she had no residual disability from her accepted lumbar strain.

The Board has duly reviewed the case record and finds that the Office met its burden of proof in establishing that appellant had no continuing disability stemming from the accepted work injury sustained on December 28, 1991 and therefore properly terminated compensation.

Under the Federal Employees' Compensation Act,[1] the Office has the burden of justifying modification or termination of compensation once a claim is accepted and compensation paid.[2] Thus, after the Office determines that an employee has disability causally related to his or her employment, the Office may not terminate compensation without establishing either that its original determination was erroneous, that the disability has ceased or that it is no longer related to the employment injury.[3]

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.[4] The Office's burden

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[1] 5 U.S.C § 8101 *et seq.* (1974).

[2] *William Kandel,* 43 ECAB 1011, 1020 (1992).

[3] *Carl D. Johnson,* 46 ECAB 804, 809 (1995).

[4] *Dawn Sweazey,* 44 ECAB 824, 832 (1993).

includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[5]

In assessing medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value, and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for, and the thoroughness of, physical 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.[6]

Appellant, then a 33-year-old part-time letter carrier, filed a notice of traumatic injury on January 4, 1992, claiming that she pulled muscles in her back while lifting buckets of mail on her route. The Office accepted a lumbar strain and paid appropriate compensation.

Appellant subsequently returned to limited duty but filed a notice of recurrence of disability on July 7, 1992, claiming that her back still hurt and that she could not deliver the mail. Appellant stopped work, began treatment with Dr. David J. Smith, a Board-certified orthopedic surgeon, and was referred for vocational rehabilitation. On October 11, 1995 the Office issued a notice of proposed termination of compensation on the grounds that the medical evidence established that appellant had no continuing disability resulting from the December 28, 1991 injury.

Appellant responded with a letter from Dr. Smith, who noted the results of a bone scan and a magnetic resonance imaging (MRI) scan, and a handwritten statement questioning the August 2, 1995 report of Dr. Charles W. Mercier, a Board-certified orthopedic surgeon and the second opinion specialist. On November 14, 1995 the Office terminated appellant's compensation, effective December 10, 1995.

The Board finds that Dr. Mercier's opinion, buttressed by those of Dr. Thomas F. Gleason, a Board-certified orthopedic surgeon, and Dr. Janice E. Polk, Board-certified in preventive medicine, who initially treated appellant, represents the weight of the medical evidence and establishes that appellant has no continuing disability resulting from the December 28, 1991 work injury. On June 9, 1992 Dr. Polk, who had examined appellant periodically since the initial injury, noted symptom magnification and stated that she had told appellant that her lumbar strain had healed and that she needed to return to normal work activities.

On April 16, 1993 appellant was referred to Dr. Gleason for a second opinion evaluation. Following his examination and review of medical records on May 17, 1993, Dr. Gleason diagnosed degenerative disc disease at L4-5 and L5-S1, based on the MRI scans dated May 30 and November 6, 1992, and right lumbar syndrome, "based on subjective complaints." He found normal lumbar lordosis, normal low back tests, and normal motion of the hips, knees and ankles,

[5] *Mary Lou Barragy*, 46 ECAB 781, 787 (1995).

[6] *Connie Johns*, 44 ECAB 560, 570 (1993).

with no evidence of motor weakness or sensory deficit in the lower extremities. Dr. Gleason concluded that appellant could return to work and that no further treatment was recommended.

After a follow-up examination on September 26, 1994, Dr. Gleason reiterated his diagnosis and stated that it was not work related. He again concluded that appellant could return to work, eight hours a day, without restrictions, and that no additional treatment was anticipated or recommended.

On August 2, 1995 appellant was again referred for a second opinion evaluation. Dr. Mercier stated in an August 22, 1995 report that, "except for subjective pain to palpation and on motion maneuvers," appellant's physical examination was normal, noting a "contradictory" straight leg raising test. Dr. Mercier, who reviewed a statement of accepted facts and the medical records, found no evidence of permanent disability or the need for further medical care and concluded that appellant "should have returned to work in June 1992" and "certainly could return to work now without restrictions."

By contrast, Dr. Smith's latest report, dated October 18, 1995, noted that an October 6, 1995 MRI scan showed degenerative disc disease at L4-5 and L5-S1 and a bone scan revealed no abnormalities. He did not address appellant's capability for returning to work but merely stated that appellant "would like her current activity levels delineated in anticipation of returning to restricted duty status."

Multiple reports from Dr. Smith during 1992 to 1995 repeated that appellant could not return to work because of "incapacitating pain" and "chronic pain," but provided no objective findings or tests to support any disability. Further, Dr. Smith released appellant to full-time work, with restrictions, on October 7, 1993, but then found her unable to work on February 14, 1994, based on his December 31, 1993 opinion which merely reported that a decision had been made that appellant could not return to her previous employment.[7] On December 12, 1994 Dr. Smith completed a work capacity evaluation indicating that appellant had limited range of motion and severe spasms in the lumbar area and could not work, but again provided no medical rationale for this conclusion.

While Dr. Smith's opinion that appellant cannot work is in disagreement with that of Drs. Gleason, Polk, and Mercier, and section 8123 of the Act[8] provides that if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician to make an examination,[9] the Board has held that the conflicting medical opinions must be of relatively equal weight to require such an impartial medical examination.[10] Here, Drs. Smith, Gleason, and Mercier are Board-certified

[7] *See John Watkins*, 47 ECAB ___ (Docket No. 94-1615, issued May 17, 1996); *Marion Thornton*, 46 ECAB 899, 906 (1995) (finding that compensation is not payable after disability from an accepted condition has ceased, even if the employee is medically disqualified to continue employment because of the effect work factors may have on the underlying condition).

[8] 5 U.S.C. § 8123(a).

[9] *Shirley L. Steib*, 46 ECAB 309, 316 (1994).

[10] *Connie Johns*, 44 ECAB 560, 570 (1993).

orthopedic specialists, but, as discussed previously, Dr. Smith's conclusion is not supported by any medical rationale or objective findings[11] and seems to be based solely on appellant's subjective complaints of pain.[12] Thus, the Board finds that Dr. Smith's reports are insufficiently probative to create a conflict in medical opinion.[13]

The Board finds that the weight of the medical evidence rests with the opinion of Dr. Mercier, as buttressed by those of Drs. Mercier, Gleason, and Polk, and is sufficient to meet the Office's burden of proof in terminating appellant's compensation.[14]

The November 13, 1995 decision of the Office of Workers' Compensation Programs is affirmed.

[11] *See Anna Chrun*, 33 ECAB 829, 835 (1982) (finding that the absence of objective evidence of disability is more compatible with the absence of disability than with its presence).

[12] *See Rosie M. Price*, 34 ECAB 292, 294 (1982) (finding that the mere occurrence of an episode of pain during the workday is not proof of an injury having occurred at work; nor does such an occurrence raise an inference of causal relationship); *Max Haber*, 19 ECAB 243, 247 (1967) (same); *see also John L. Clark*, 32 ECAB 1618, 1624 (1981) (finding that a medical opinion based on a claimant's complaint that he hurt too much to work, with no objective signs of disability being shown, was insufficient to establish a basis for compensation).

[13] *See Wanda E. Maisonet*, 48 ECAB ___ (Docket No. 94-2466, issued November 29, 1996) (finding no conflict in the medical opinion evidence because appellant's doctor failed to explain the basis for his conclusion that appellant was still disabled by his back strain); *see also Gary R. Sieber*, 46 ECAB 215, 224 (1994) (finding that the weight of a medical opinion is determined by its reliability, its probative value, and its convincing quality).

[14] *See Samuel Theriault*, 45 ECAB 586, 590 (1994) (finding that a physician's opinion was thorough, well rationalized, and based on an accurate factual background and thus constituted the weight of the medical evidence that appellant's accepted injury had resolved).

Dated, Washington, D.C.
April 7, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member