

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ESSIE FRANKLIN and U.S. POSTAL SERVICE,  
POST OFFICE, Royal Oak, Mich.

*Docket No. 96-59; Submitted on the Record;  
Issued July 23, 1998*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits effective May 1, 1993 on the grounds that she had no further condition or disability causally related to her accepted employment injuries.

The Office accepted that appellant sustained lumbosacral strain and a herniated disc at L5-S1 due to traumatic injuries in 1982 and 1986.<sup>1</sup>

In an initial treatment report dated February 2, 1988, Dr. John McCollough, a Board-certified orthopedic surgeon and appellant's attending physician, noted appellant's history of employment-related injuries to her back and diagnosed low back strain, degenerative disc disease and a probable herniated disc.

In a report dated August 3, 1990, Dr. McCollough diagnosed low back strain "sustained while lifting at work in 1982 and 1986, and when [appellant] fell in the parking lot in January 1986." He further diagnosed degenerative joint disease of the lumbar spine due to appellant's age and employment injuries and found that her condition was "permanent and significantly reduces her ability to perform employment and other daily activities requiring significant bending, lifting, pushing, pulling, standing, walking and remaining in one position."

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<sup>1</sup> This case has previously been before the Board. The Office found that appellant's disability beginning March 12, 1986 was not employment related in decisions dated August 11, 1987 and August 19, 1988 and denied appellant's request for reconsideration by decision dated August 26, 1988. The Office further denied appellant's request for a hearing by decision dated October 15, 1988 on the grounds that she had previously requested reconsideration. The Board, in a decision dated July 26, 1989, Docket No. 89-361, affirmed the Office's October 15, 1988 as modified and noted that the Office had not yet considered appellant's request for a hearing on the Office's August 19, 1988 decision. By decision dated September 17, 1990, an Office hearing representative found that the case was not in posture for a decision on the issue of whether appellant's disability after March 12, 1986 was causally related to her April 15, 1982 employment injury.

In October 1990 the Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Martin W. Spiegler, an orthopedic surgeon, for a second opinion evaluation.

In a report dated December 10, 1990, Dr. Spiegler noted that a computerized tomography (CT) scan performed on July 8, 1986 revealed a herniated disc at L5-S1. Dr. Spiegler attributed appellant's disc derangement to her 1986 employment injury and stated:

“The clinical evaluation performed at this time revealed restriction of motion in the spine as well as a depressed left Achilles' reflex and a left lower extremity atrophy. These findings are consistent with the CT and MRI [magnetic resonance imaging study] findings.

“Based on the findings noted above, it is my recommendation that [appellant] be restricted from the performance of work activity involving lifting over 25 pounds, [and] involving repeated bending, twisting or climbing. In addition, she should be able to sit or stand at will.”

On March 13, 1991 Dr. Robert C. Nestor, a Board-certified orthopedic surgeon, conducted a fitness-for-duty examination on behalf of the employing establishment. Dr. Nestor diagnosed “degenerative disc disease in the lumbar spine and a possible herniated nucleus pulposus.” He indicated that he needed the results of a bone scan and a myelogram prior to reaching a disability determination.

In a report dated February 26, 1992, Dr. McCollough noted that appellant had undergone multiple objective tests including an EMG [electromyogram] which revealed L5-S1 radiculopathy. He found that appellant's condition prevented her from “remaining in any one position (including sitting) for more than a few minutes at a time.”

By letter dated June 3, 1992, the Office referred appellant to Dr. Scott Monson, a Board-certified orthopedic surgeon, to resolve a conflict in the medical opinion evidence regarding the nature and extent of appellant's employment-related disability.

In a report dated July 10, 1992, Dr. Monson found that appellant's CT scan obtained after her January 1986 employment injury showed a ventral herniated disc at L5/S1 and that a subsequent CT scan “showed bulging discs at multiple levels with degenerative changes of the spine. Dr. Monson related:

“[Appellant] has evidence of ventral herniated disc. Clinically, ventral herniated discs are irrelevant because they do not compress nerves. Posterior herniated discs are a different story, and clinically can be very relevant. She does not have evidence on the CT scan and MRI report that I reviewed of a posterior herniated disc. She does have evidence of multiple bulging discs with probable compression at the S1 level on the left.”

“Clinically, her symptoms are too diffuse to be radicular, but I do believe that she likely has a chronic S1 radicular problem on the left. The EMG was consistent with that and her complaints vaguely resemble an S1 problem.”

“The question as to causation is anybody’s guess. It [has] been years since she has had her complaints. The only findings on the tests are that of bulging discs and degenerative changes in the spine. There is no frank herniated disc posterior with nerve compression.”

Dr. Monson recommended that appellant not perform lifting or repetitive bending. He further concluded that she “probably had strains and sprains at the time of the lifting incident. She even could have had a ventral disc herniation. But ventral disc herniations do not result in long-term disability.” Dr. Monson related appellant’s degenerative disc disease to her age and weight, and further detailed her work restrictions in an OWCP-5 dated December 14, 1992.

In response to an inquiry from the Office, Dr. Monson opined in a supplemental report dated January 14, 1993 that appellant’s current restrictions were due to degenerative disc disease and not to an employment injury.

On March 26, 1993 the Office informed appellant that it proposed termination of her compensation on the grounds that she had no further employment-related condition or disability. The Office provided appellant 30 days within which to submit additional evidence.

In a report dated April 1, 1993, Dr. McCollough indicated that he continued to treat appellant for “multiple work[-]related back injuries occurring in 1982 and again in 1986. He diagnosed chronic low back strain, degenerative disc disease, and a herniated lumbar disc.

In a report dated April 10, 1993, Dr. Carl Haeger noted that an MRI of appellant’s lumbar spine taken on March 11, 1990 showed a central and lateral bulging disc at L5-S1, discussed the results of further objective testing and diagnosed a central disc herniation. Dr. Haeger included the 1990 MRI which revealed a mild central and later bulging disc.

By decision dated April 27, 1993, the Office terminated appellant’s compensation benefits effective May 1, 1993.

Appellant requested a hearing, which was held on March 28, 1995. At the hearing, appellant submitted a report dated April 21, 1995, from Dr. McCollough, who stated that he had reviewed Dr. Monson’s report dated July 10, 1992 and disagreed that appellant’s degenerative disc disease and osteoarthritis were not employment-related conditions, as it was medically accepted that traumatic injuries could prematurely cause or hasten the degenerative process. He further attributed appellant’s low back strain, herniated disc and radiculopathy to her accepted employment injuries. Dr. McCollough stated:

“I have never seen a ventrally herniated lumbar disc (one that assumably herniates out the front side of the vertebral column). I cannot for the life of me, figure out how it can be demonstrated on a myelogram (the contrast material of which is confined to the spinal canal – bordered by the posterior, not the anterior border of

vertebral bodies). The only herniated disc that I have ever seen, herniated posteriorly from between the vertebral bodies. I can assure that these are usually painful (whether or not there is compression of nerve roots).

“I can assume that it is generally agreed that she is disabled. I hope the above clarifies my position on the causation of her disability.”

By decision dated July 31, 1995 and finalized August 9, 1995, the Office hearing representative affirmed the Office’s April 27, 1993 decision.

The Board finds that the Office did not meet its burden of proof to terminate appellant’s compensation benefits effective May 1, 1993 on the grounds that she had no further condition or disability causally related to her accepted employment injuries.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his or her employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>2</sup>

The Office based its termination of appellant’s benefits on the report of Dr. Monson, a Board-certified orthopedic surgeon to whom it referred appellant for an impartial medical examination. The Board concludes that Dr. Monson’s reports, dated July 10, 1992 and January 14, 1993, are not sufficiently well rationalized to constitute the weight of the medical opinion evidence. In his July 10, 1992 report, Dr. Monson diagnosed multiple bulging discs, including a ventral herniated disc at L5-S1, and degenerative disc disease. He further found symptoms of radiculopathy at S1. Dr. Monson attributed appellant’s degenerative disc disease to her age and weight. He further opined that a ventral herniated disc was not medically significant and would not cause long-term disability because it did not compress the nerve root. Dr. Monson, however, did not adequately explain his finding of a ventral disc herniation in view of the 1990 MRI finding of a central and lateral bulging disc at L5-S1.<sup>3</sup> Dr. Monson further did not discuss whether the multiple bulging discs and radiculopathy which he diagnosed were causally related, directly or by aggravation, to the accepted employment injuries. By letter dated January 14, 1993, the Office requested that Dr. Monson clarify whether appellant had any further restrictions due to her work injury. In his supplemental report dated January 14, 1993, Dr. Monson stated that he did “not feel that [appellant’s] current need for restrictions is related to any work-related problem. In my opinion, her current condition is secondary to her degenerative condition.” Dr. Monson, however, did not provide any medical rationale explaining why appellant’s problems were due solely to her degenerative disc disease and not to any other diagnosed condition.

The Board has previously recognized that when the impartial specialist’s statement of clarification or elaboration is not forthcoming to the Office or if the doctor is unable to clarify or elaborate on his original report or if the doctor’s supplemental report is also vague, speculative

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<sup>2</sup> *Gail D. Painton*, 41 ECAB 492, 498 (1990).

<sup>3</sup> The CT scan obtained on July 8, 1986 revealed a “mild ventral, central herniation of the disc” at L5-S1.

or lacks rationale the Office must submit the case record, together with a detailed statement of accepted facts to a second impartial specialist for a rationalized medical opinion on the issue in question.<sup>4</sup> On remand the Office shall obtain an opinion from a second impartial medical specialist as to whether appellant has any residual disability which is causally related to the accepted employment injury. After such further development as necessary, the Office shall issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs dated July 31, 1995 and finalized August 9, 1995 is hereby reversed.

Dated, Washington, D.C.  
July 23, 1998

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>4</sup> *Margaret Ann Connor*, 40 ECAB 214 (1988).