

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VONDA L. MILLER and DEPARTMENT OF THE NAVY,
MARINE CORPS SUPPORT ACTIVITY, Kansas City, Mo.

*Docket No. 96-1077; Submitted on the Record;
Issued June 15, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation effective May 29, 1993.

The Board has duly reviewed the case record and finds that the Office met its burden of proof to terminate compensation benefits.

In the present case, the Office accepted that appellant sustained a cervical strain and a low back strain in the performance of the federal employment on January 14, 1991. Appellant did not return to work since the January 14, 1991 employment injury and was receiving temporary total disability benefits.

Once the office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. 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 disabling condition has ceased or that it is no longer related to the employment.¹ The Office's burden of proof includes the necessity of furnishing rationalized medical evidence based on a proper factual and medical background.²

By decision dated May 4, 1993, the Office terminated appellant's compensation benefits effective May 29, 1993, stating that the opinion of appellant's treating physician, Dr. Stephen L. Reintjes, a neurological surgeon, established that appellant could perform her usual job of comptroller. In a report dated July 31, 1992, Dr. Reintjes considered appellant's history of injury, performed a physical examination, reviewed computerized axial tomography (CAT)

¹ *Patricia M. Mitchell*, 48 ECAB ____ (Docket No. 95-384, issued February 27, 1987); *Patricia A. Keller*, 45 ECAB 278 (1993).

² *Larry Warner*, 43 ECAB 1027 (1992); *see Del K. Rykert*, 40 ECAB 284, 295-296 (1988).

scans of the lumbar spine and a March 20, 1991 magnetic resonance imaging (MRI) scan, and diagnosed musculoskeletal low back and neck pain. In a work restriction evaluation dated January 11, 1993, Dr. Reintjes stated that appellant could return to work full-time with lifting restrictions of up to 20 pounds and intermittent walking, sitting and standing.

Appellant requested an oral hearing before an Office hearing representative which was held on February 9, 1994. Appellant submitted an additional medical report dated August 25, 1992 from Dr. William O. Hopkins, a Board-certified orthopedic surgeon. In his report, Dr. Hopkins considered appellant's history of injury, performed a physical examination, reviewed a CAT scan, x-ray, an MRI of the cervical spine and myelography of the lumbar spine. He diagnosed "obvious disc abnormalities, the most significant at the L5-S1 level." Dr. Hopkins opined that appellant was unable to work because she could not sit, stand or walk for any significant period of time and that her disability was permanent unless she underwent surgery and her situation substantially improved. In subsequent reports dated September 23, 1993 and April 21, 1993, Dr. Hopkins reiterated his opinion that appellant was permanently disabled unless she underwent surgery.

By decision dated April 19, 1994, the Office hearing representative found that Dr. Hopkins' opinion stating that appellant was unable to work created a conflict with Dr. Reintjes' opinion that appellant was able to work, and it was necessary to remand the case for appellant to be evaluated by an impartial medical specialist and a *de novo* decision to be issued. The Office, however, affirmed the May 4, 1993 decision stating that the decision to terminate was correct at the time it was issued as the evidence that created the conflict, *i.e.*, Dr. Hopkins' report, was submitted after the termination.

The Office subsequently referred appellant to Dr. Roger W. Hood, an impartial medical specialist and orthopedic surgeon. In his report dated July 22, 1994, Dr. Hood considered appellant's history of injury, performed a physical examination, and reviewed diagnostic tests including x-rays and MRI scans which except for some straightening of the lumbar and cervical spine, slight bulging at L4-5 and some mild degenerative disc disease at L5-S1 were normal. He concluded that appellant's complaints far outweighed her objective findings and that in terms of work, appellant "could be doing anything for which she were so motivated." Dr. Hood stated that it was difficult "to assess appellant's exact degree of impairment secondary to her overreaction and symptom modification" and rated her a five percent whole body impairment. In a report dated August 19, 1994, Dr. Hood stated that appellant was able to perform the duties of the comptroller. He stated that although it was difficult to say when appellant could have returned to her duties, he would have thought that appellant could return to work within two or three months of her January 14, 1991 employment injury. He opined that appellant's five percent permanent impairment was due to her work-related injury.

By decision dated August 24, 1994, the Office determined that appellant was no longer disabled within three months of the January 14, 1991 employment injury based on Dr. Hood's opinion which the Office found constituted the weight of the medical evidence as Dr. Hood was an impartial medical specialist. By letter dated September 23, 1994, which was postmarked September 27, 1994, appellant submitted a request for a second oral hearing before an Office hearing representative which the Office denied on October 28, 1994 as untimely.

By letter dated August 17, 1995, appellant requested reconsideration of the Office's August 24, 1994 decision. Appellant submitted additional evidence to support her claim. In a report dated August 17, 1995, Dr. Dale D. Dalenberg, an orthopedic surgeon, considered that appellant had a work-related back strain in 1990, performed a physical examination and reviewed diagnostic tests including x-rays, CAT scans and the July 1994 MRI which he stated was extremely difficult to interpret because it was of very poor quality and quite grainy. He diagnosed left S1 radiculopathy, perhaps secondary to left L5-S1 disk herniation and stated that he believed appellant probably sustained a left-sided L5-S1 disk herniation "with her original injury, which healed somewhat." Dr. Dalenberg stated that since appellant's radicular complaints began in February 1995, he had no current studies to address the problem and recommended a repeat MRI scan of the lumbar spine to rule out a left L5-S1 disk herniation. In a report dated July 11, 1994, Dr. Steven B. Wilkinson, a neurological surgeon, opined that three years ago appellant had degenerative changes and bulging discs at multiple levels of her lumbar spine but no true herniated disc or foraminal stenosis. He stated that her physical examination was consistent with a radiculopathy. Further, Dr. W. Bob Davis, a Board-certified radiologist, performed a CAT scan of the lumbar spine with multipunch die on appellant on August 19, 1991 and determined that appellant had a herniated nucleus pulposus on the left side of the midline at the L5-S1 level and some mild central bulging of the annulus fibrosis at the L4-5 level.

By decision dated November 13, 1995, the Office denied modification of the August 24, 1994 decision.

In situations where there are 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 on a proper factual background, must be given special weight.³ In his July 22 and August 19, 1994 reports, Dr. Hood opined that appellant was able to work as a comptroller within two or three months of the January 14, 1991 employment injury and that appellant's complaints outweighed her objective findings. Dr. Dalenberg's diagnosis in his August 17, 1995 opinion that appellant probably sustained a left-sided L5-S1 disk herniation with the January 14, 1991 employment injury which somewhat healed is vague and speculative and therefore not probative. Further, his opinion does not address whether appellant could return to work.⁴ Dr. Dalenberg's diagnosis of radiculopathy is a new condition and was not accepted by the Office. Dr. Wilkinson's July 11, 1994 report in which he diagnosed degenerative changes, bulging discs and radiculopathy and Dr. Davis' August 19, 1991 CAT scan showing a herniated nucleus pulposus at L5-S1 are not probative because they do not address appellant's ability to work or whether the diagnosed conditions are work related.⁵ The Board finds that Dr. Hood's opinion that appellant was capable of returning to work in March or April 1991 is sufficiently well rationalized in establishing that appellant recovered from her January 14, 1991 employment injury and is based

³ *Kathryn Haggerty*, 45 ECAB 383, 389 (1994); *Jane B. Roanhaus*, 42 ECAB 288 (1990).

⁴ *See William S. Wright*, 45 ECAB 498, 504 (1994).

⁵ *See Larry Warner*, *supra* note 2 at 1032 .

on a proper factual background. Therefore, as an impartial medical specialist, Dr. Hood's opinion constitutes the weight of the evidence.

Accordingly, the decision of the Office of Workers' Compensation Programs dated November 13, 1995 is hereby affirmed.

Dated, Washington, D.C.
June 15, 1998

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member