

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of GILDA THOMAS and DEPARTMENT OF THE ARMY, USAECOM,  
Fort Monmouth, N.J.

*Docket No. 95-1506; Submitted on the Record;  
Issued March 3, 1998*

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DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits effective November 15, 1992; and (2) whether appellant has met her burden of proof in establishing that she has continuing disability causally related to her February 26, 1976 employment injury.

On March 2, 1976 appellant, then a 48-year-old inventory management specialist, filed a claim alleging that on February 26, 1976, she injured her lower back and her right knee when she tripped over some wires and fell. Appellant received continuation of pay for intermittent time lost from work from March 1 to August 19, 1976 and received leave pay for intermittent time lost from work from August 20, 1976 to March 23, 1977, after which she stopped working. Following development of the medical evidence, the Office accepted appellant's claim for a traumatic low back sprain superimposed on discogenic disease at L4-5 and traumatic joint effusion of the right knee, as diagnosed on March 8, 1976 by Dr. Leonard Tierno, an osteopath specializing in family practice and appellant's attending physician. Appellant was placed on the periodic rolls beginning March 24, 1977.

Subsequent to the acceptance of her claim, appellant continued to submit periodic treatment notes and medical reports from her physicians, Dr. Leonard Tierno and his associate, Dr. Frank L. Wilczynski, an osteopath. In a report dated April 23, 1977, Dr. Tierno diagnosed cervical discogenic syndrome, in addition to his prior diagnoses and opined that appellant was totally disabled from March 24, 1977. Appellant continued to submit periodic reports from Drs. Tierno and Wilczynski dating through May 8, 1992. In these reports, appellant's physicians noted that appellant was being treated for employment-related injuries, repeated their earlier diagnoses and stated that appellant remained totally disabled.

On March 18, 1992 the Office referred appellant, together with the medical evidence of record and a statement of accepted facts, to Dr. Thomas J. O'Dowd, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated May 11, 1992, Dr. O'Dowd stated

that he examined appellant that day, noted the history of appellant's injury and documented appellant's range of motion and complaints of pain as revealed on physical examination. With respect to appellant's right knee, Dr. O'Dowd stated that appellant was "asymptomatic and requires no treatment." With respect to her lumbar spine, the physician opined that appellant "is not incapacitated ... other than from a subjective standpoint." Regarding her cervical condition, Dr. O'Dowd noted that appellant had not complained of cervical pain for at least five months following her accident and concluded that there was no relationship between appellant's cervical degenerative disc disease and her February 26, 1976 employment injury. On an accompanying work restriction evaluation form, Dr. O'Dowd indicated that appellant could lift 0 to 10 pounds and could work 4 hours per day, but was a very poor candidate for return to work due to long-term occupational disease.

In order to resolve the conflict in medical opinion between appellant's physicians, Drs. Tierno and Wilczynski, and Dr. O'Dowd, the Office referred appellant, together with her medical file and statement of accepted facts, to Dr. Norman Eckbold, a Board-certified orthopedic surgeon selected as the impartial medical specialist. In a report dated July 16, 1992, Dr. Eckbold reviewed appellant's medical history dating back to the employment incident and provided his findings on examination. Dr. Eckbold concluded that appellant "has actually no objective orthopedic or neurologic functional deficits" and added that in the absence of objective orthopedic or neurological deficits or in the absence of any study indicating that appellant had sustained a herniated lumbar disc, he found no ratable disability and appellant could return to work. On an accompanying work restriction evaluation form, Dr. Eckbold indicated that appellant could lift 20 to 50 pounds and could work 8 hours per day.

On October 6, 1992 the Office issued a notice of proposed termination of compensation, finding that the weight of the medical evidence rested with Dr. Eckbold.

By letter dated October 28, 1992, appellant objected to the Office's proposed termination. She submitted results of a magnetic resonance imaging (MRI) scan dated October 14, 1992, which was interpreted as revealing a herniated nucleus pulposus at L4-5 and L5-S1, with degenerative disc disease at L2 through S1. Appellant additionally submitted an October 28, 1992 report from Dr. Wilczynski, who noted that the MRI scan revealed a herniated disc at the same disc level as was injured in the employment accident and stated that he disagreed with Dr. Eckbold's conclusion that appellant had no ratable disability. The physician reiterated his prior findings that in addition to her lumbar condition, appellant had cervical osteoarthritis and disc disease and stated that within a reasonable degree of medical certainty, appellant was totally and permanently disabled from her prior occupation.

In a decision dated November 19, 1992, which incorporated a memorandum summarizing the evidence, the Office terminated appellant's compensation for wage loss effective November 15, 1992, on the grounds that the weight of the medical evidence, represented by the report of Dr. Eckbold, established that appellant's employment-related disability had ceased. In reviewing the newly submitted evidence of file, the Office stated that given the length of time between appellant's February 26, 1976 injury and Dr. Wilczynski's October 28, 1992 diagnosis of herniated nucleus pulposus, the physician did not sufficiently explain his conclusion that appellant's herniated disc was causally related to the employment injury. Compensation for

wage loss was terminated effective November 15, 1992. The Office also indicated that payment of expenses for medical treatment rendered in connection with the accepted low back condition would continue, but that payment of medical expenses incurred for treatment of appellant's neck condition and herniated disc was rejected, as these conditions were not accepted as causally related to the February 26, 1976 employment incident. Finally, the Office also terminated payment of medical expenses incurred for treatment of the accepted right knee condition, on the basis that the medical evidence established that no further treatment of the right knee was warranted.

By letter dated December 11, 1992, appellant requested an oral hearing. Additional medical evidence was submitted prior to and subsequent to the hearing.

In a report dated November 30, 1992, Dr. Wilczynski reiterated his October 28, 1992 opinion that the MRI scan showed a herniated disc in the same position as appellant's accepted injury. In a letter dated May 6, 1993, Dr. Wilczynski noted that he had been treating appellant since March 8, 1976 for low back and right knee injuries incurred in a work-related accident. He listed his diagnoses as chronic post-traumatic cervical-thoracic strain and sprain with discogenic disc disease; chronic post-traumatic lumbar sacral strain and sprain with herniated disc at L4-5 and L5-S1; and post-traumatic internal derangement of the right knee. He concluded that, within a reasonable degree of medical certainty, appellant's condition was "a direct result of her trauma" on February 26, 1976 and that "there [was] a direct causal; relationship between that injury and her present permanent disability." In a letter dated July 13, 1993, Dr. Wilczynski addressed the issue of causal relationship, stating:

"I believe within a reasonable degree of medical certainty that her present complaints are caused either directly or indirectly from her trauma of February 1976. This belief is based on my careful review of her chart dating prior to 1976 and the progression of complaints after this trauma. The progression of her complaints including a slow insidious onset of neck pain is consistent with injuries of this type....

"Assuming that the facts and history presented are correct. In light of the fact that [appellant] had no prior complaints relative to the areas in question and it seems more than coincidence that the areas involved are the same exact areas that now have such diffuse damage (considering that [appellant] has n[o]t done any strenuous task to injure her back since 1976). Finally, there is a continuity in care until the present time. Taking into consideration all of the above I feel confident in stating that there was a direct causal relationship between [appellant's] present condition and her trauma of [February 26, 1976]."

In a decision dated August 9, 1993, the Office hearing representative affirmed the Office's November 19, 1992 decision. The Office hearing representative found, with respect to the issue of termination, that the weight of the medical evidence was represented by Dr. Eckbold, the impartial medical examiner. With respect to whether appellant had established any continuing disability causally related to her February 26, 1976 employment injury, the Office hearing representative found that appellant had not met her burden of proof to establish that her current cervical condition and herniated lumbar disc were causally related to the employment

injury. With respect to Dr. Wilczynski's diagnosis of post-traumatic internal derangement of the right knee, the Office hearing representative found the physician's opinion insufficiently rationalized to support this diagnosis and further noted that the Office had accepted only joint effusion of the right knee, not internal derangement.

In a letter dated December 7, 1993, appellant requested reconsideration of the Office's August 9, 1993 decision. In support of her request, appellant submitted an additional copy of the October 14, 1992 MRI scan results, reports from Dr. Wilczynski, a letter from Dr. Eckbold to the Office, and two medical reports from Dr. David Weiss, a Board-certified orthopedist.

In his report dated November 1, 1993, Dr. Wilczynski stated that in 1976 when the Office accepted appellant's claim for lumbar strain, the term lumbar strain was synonymous with low back pain. The physician explained that at that time, MRI scan technology was not widely in use and the only way to confirm a diagnosis of herniated disc was through the use of invasive myelography, a procedure most patients tried to avoid. Thus, the term lumbar strain was used to encompass undiagnosed herniated discs unless true clinical symptoms of radiculitis were present. The physician concluded that, therefore, based on the lack of superior diagnostic tools at the time of the injury and based on a continuity of appellant's complaints as well as her physical limitations and complaints of pain, it was his opinion that appellant's herniated disc was causally related to her 1976 employment injury. With respect to appellant's cervical complaints, Dr. Wilczynski stated that the initial symptoms and signs of a cervical strain may be slight and go unnoticed until after a lag of several days when the patient becomes aware of increasing pain and stiffness in the neck. He added that it has been his experience that this lag time varies a great deal and that although a lag period of several months, as in appellant's case, is not common, it does occur. He stated that as appellant denies any further injury and there is no other evidence that there was further trauma to her cervical spine, it was his opinion that her then current cervical complaints were causally related to the February 26, 1976 employment accident. With respect to his diagnosis of internal derangement of the right knee, the physician stated that joint effusion, the accepted condition, is caused by swelling and fluid accumulation in the joint secondary to inflammation. The inflammation was caused by trauma in this case and would not have occurred unless some type of internal problem was present.

In a report dated November 29, 1993, Dr. Weiss stated that he had examined appellant and had reviewed appellant's history of injury as well as the relevant medical reports of record. Dr. Weiss diagnosed herniated nucleus pulposus L4-5, L5-S1 by positive MRI scan, lumbar radiculitis and post-traumatic osteoarthritis lumbosacral spine. The physician stated: "At present, the patient still suffers from residuals of her traumatic-induced injuries including low back pain and stiffness daily; weakness in the lumbosacral spine; numbness in the right lower extremity, into the right foot intermittently and the patient notes that changes in the weather will exacerbate her pain. In addition, the patient has undergone restrictions in her activities of daily living as previously outlined in my report of today." The physician concluded that "as a result of the patient's work-related injury of February 16, 1976," appellant has a 12 percent impairment for the loss of motor strength right lower extremity, 6 percent impairment for unoperated intervertebral disc at L4-5, L5-S1 and 12 percent impairment for the loss of range of motion for a total impairment rating of 30 percent.

In a supplemental report dated April 25, 1994, Dr. Weiss noted that appellant reported having no difficulty with activities of daily living and no low back pain prior to the 1976 employment accident. He concluded that, in light of appellant's history and the positive physical findings on his examination, it was his opinion that appellant's low back condition was related to the February 26, 1976 employment history.

Appellant also submitted several letters from Dr. Eckbold to the Office, in which the physician noted that there had been an MRI scan performed and asked whether the Office would like him to prepare a supplemental report. In his final letter dated November 16, 1993, Dr. Eckbold stated that he had not personally reviewed the MRI scan study, but that "[t]he American Medical Association, *Guides to the Evaluation of Permanent Impairment*, suggests a five percent impairment of a whole person and one percent in addition to that for an additional level. It does not include whether or not the disc herniation was caused or aggravated by a work incident."

In a decision dated August 16, 1994, the Office found that the newly submitted reports of Dr. Wilczynski did not establish that appellant's current medical condition was causally related to the original 1976 employment injury. The Office found that, as there was still no rationalized evidence to support that appellant's herniated disc identified in 1992 was causally related to the 1976 employment injury, continuing disability due to the job injury was still unsupported by the evidence of record. With respect to appellant's claimed cervical condition, the Office noted that Dr. Wilczynski's opinion that a cervical condition may manifest itself days or months after the initial injury was speculative. The Office found that the reports of Dr. Weiss merely noted that he had examined appellant and stated that appellant was still disabled due to her diagnosed work-related conditions. The Office also noted that a review of the record revealed evidence that appellant had been involved in an automobile accident, as documented in the March 1, 1979 report of a Dr. Patrick D. Abiuso of Cooper Medical Center. Dr. Abiuso provided a history that appellant was on disability secondary to cervical and lumbosacral pain after an automobile accident. The Office noted that although the medical report indicated that appellant had a history of disc disease in the lumbar and cervical spine area subsequent to a job fall, Dr. Abiuso's report nonetheless noted that appellant also had a two to three-week history of left shoulder pain in the "wing bone" area which was now involving the trapezius muscle with pain in the cervical spine region.

By letter dated September 22, 1994, appellant requested reconsideration of the Office's August 16, 1994 decision. In support of her request, appellant submitted a September 22, 1994 report from Dr. Abiuso who stated that the automobile accident apparently occurred on February 9, 1978, as documented in Dr. Tierno's February 20, 1978 medical report. The physician further stated:

"As I was not [appellant's] initial examining physician in either [the automobile accident or the employment accident] and have not seen her in the past 15 years, it is difficult for me to comment on causation or her present condition. In conclusion it is possible that [appellant's] hospitalization of March 29, 1979, was a result of a work-related accident in 1977, a motor vehicle accident in 1978, or a combination of the two."

In a decision dated December 14, 1994, the Office found Dr. Abiuso's medical report speculative and indecisive, and thus insufficient to warrant modification of the prior decision.

The Board finds that the Office met its burden of proof in establishing that appellant's disability causally related to her February 26, 1976 employment injury ceased by November 15, 1992, the date the Office effectively terminated her compensation benefits.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.<sup>1</sup> 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 disability has ceased or that it is no longer related to the employment.<sup>2</sup> Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.<sup>3</sup> To terminate authorization or medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.<sup>4</sup>

When there are opposing medical reports of virtually equal weight, the case must be referred to an impartial medical specialist to resolve the conflict in the medical opinion.<sup>5</sup> The opinion of the impartial medical specialist, if based on a proper factual background and sufficiently well rationalized, must be given special weight.<sup>6</sup>

In this case, the Office properly found a conflict in medical opinion between Drs. Tierno and Wilczynski, appellant's attending physicians, who opined that appellant is unable to work due to residuals causally related to the February 26, 1976 employment injury and Dr. O'Dowd, the Office referral physician who opined that, with respect to her accepted lumbar spine injury, appellant was not incapacitated other than from a subjective standpoint, further opined that there was no relationship between appellant's then current cervical degenerative disc disease and her accepted employment injury and concluded that appellant was capable of working four hours a day. In order to resolve this conflict, the Office referred appellant, a statement of accepted facts, medical records and a list of specific questions to Dr. Eckbold, a Board-certified orthopedic surgeon, for an impartial medical evaluation pursuant to section 8123(a) of the Act. In his July 16, 1992 report, Dr. Eckbold provided a history of injury, noted appellant's complaints of pain and his findings on examination and opined that appellant had no objective orthopedic or neurological deficits, no ratable disability and could return to work eight hours a day. The Board

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<sup>1</sup> *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

<sup>2</sup> *Id.*

<sup>3</sup> *Furman G. Peake*, 41 ECAB 361, 364 (1990).

<sup>4</sup> *Id.*

<sup>5</sup> Section 8123(a) of the Federal Employees' Compensation Act provides that "[i]f 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." See 5 U.S.C. § 8123(a); *Melvinia Jackson*, 38 ECAB 443 (1987).

<sup>6</sup> *Jane B. Roonhaus*, 42 ECAB 288 (1990).

finds that Dr. Eckbold's opinion is based on a complete and accurate factual background and is sufficiently well rationalized to be accorded special weight. Dr. Eckbold's opinion thus constitutes the weight of the medical evidence and establishes that appellant did not, at the time of the termination, have any residual disability causally related to her February 26, 1976 employment injury.

The Board further finds that this case is not in posture for decision on the issue of whether appellant has established that she has any continuing disability causally related to her accepted employment conditions after November 15, 1992.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened before it may terminate or modify compensation benefits.<sup>7</sup> The fact that the Office accepted appellant's claim for a specified period of disability does not shift the burden of proof to appellant. The burden of proof is on the Office with respect to the period subsequent to the date when compensation is terminated or modified.<sup>8</sup>

In the present case, however, at the time of the November 19, 1992 decision, Dr. Eckbold's opinion constituted the weight of the medical opinion evidence as to the date of cessation of residuals from appellants accepted employment injuries. Therefore, based upon Dr. Eckbold's report, the Office correctly terminated appellant's compensation benefits. The burden of proof therefore shifts to appellant to establish that any disability claimed after November 15, 1992 is causally related to her accepted injury.

Appellant submitted further medical evidence which supports her claim for continuing disability. In particular, Dr. Weiss opined in his November 29, 1993 and April 25, 1994 reports that appellant still suffers from residuals causally related to the accepted February 26, 1976 employment injuries. Dr. Weiss cited to diagnostic testing which he stated lumbar radiculitis and post-traumatic osteoarthritis of the lumbosacral spine which he attributed to the February 16, 1976 injury.

The Federal Employees' Compensation Act, at 5 U.S.C. § 8123(a), in pertinent part, provides: "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."

The Board finds that the opinion of Dr. Weiss creates a conflict with the opinion of Dr. Eckbold as to whether appellant has disability after November 15, 1992 causally related to her accepted employment injury. The Board will remand the case to the Office for further development by referring appellant, together with a statement of accepted facts, to an appropriate Board-certified specialist for a well-rationalized opinion on whether appellant had disabling residuals of her accepted conditions after November 15, 1992, to be followed by a *de novo* decision.

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<sup>7</sup> *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

<sup>8</sup> *George J. Hoffman*, 41 ECAB 135 (1989); *Raymond M. Shulden*, 31 ECAB 297 (1979); *Anna M. Blaine (Gilbert H. Blaine)*, 26 ECAB 351 (1975).

The decisions of the Office of Workers' Compensation Programs dated August 16 and December 14, 1994, are affirmed in part and set aside in part and the case remanded for further development consistent with this decision.

Dated, Washington, D.C.  
March 3, 1998

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member