

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MARY A. LUCIEN and DEPARTMENT OF TREASURY,  
INTERNAL REVENUE SERVICE, Holtsville, N.Y.

*Docket No. 96-2659; Submitted on the Record;  
Issued November 19, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,  
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits.

The Board has duly reviewed the case record and finds that the Office did not meet its burden of proof in this case.

In the present case, the Office accepted that appellant, a tax examiner, sustained a right ankle strain and cervical strain on September 22, 1994 as a result of a fall. The record indicates that appellant stopped work on the date of injury and did not return.

Appellant's treating physician Dr. Donald Holzer, a Board-certified neurologist, continued to submit reports to the record throughout 1995 indicating that appellant remained disabled due to tingling and numbness radiating into the left upper extremity, paracervical as well as paralumbar muscle spasm, which were causally related to the accepted employment injury. Dr. Holzer advised the Office that he was awaiting authorization for an electromyography (EMG) of the cervical and lumbar region and a magnetic resonance image (MRI) of the lumbar spine to further diagnose appellant's employment-related condition.

The Office referred appellant to Dr. John C. Killian, a Board-certified orthopedic surgeon, for a second opinion evaluation. Dr. Killian examined appellant on April 13 and November 14, 1995. In his April 19, 1995 report, Dr. Killian opined that appellant had a mild residual impairment with respect to her cervical spine which was partially attributable to the employment injury and which was mostly attributable to a preexisting degenerative condition for which she was receiving treatment at the time of the fall. Dr. Killian opined that the employment-related aggravation was temporary and would resolve within another 2 to 3 months, at which time appellant could return to her regular work. In his November 20, 1995 report, Dr. Killian opined that appellant's complaints of right-sided neck pain had remained essentially the same and she continued to experience right-sided low back pain as well. Dr. Killian noted

that MRI examination of appellant's cervical spine showed significant degenerative disease at C5-6 and C6-7 with central posterior herniation of the C5-6 disc and bulging of the C6-7 disc. He stated that in the presence of the significant degenerative changes, he did not feel that the herniated C5-6 disc was attributable to the September 22, 1994 injury. Dr. Killian also stated that the bulging disc at C6-7 was of questionable clinical significance. Dr. Killian concluded that appellant had now reached maximum medical benefit from the treatment she had received for her September 22, 1994 employment injury and that she had returned to her preinjury status. Dr. Killian noted that appellant did have a mild residual impairment due to her preexisting degenerative arthritis in her neck, however, that the aggravation of that condition had now resolved. Dr. Killian stated that appellant was capable of returning to work at her regular duties and did not require further medical treatment or diagnostic studies. On May 29, 1996 Dr. Holzer reported that EMG of appellant's cervical spine was consistent with a C5-7 radiculopathy on the right side.

The Office terminated appellant's compensation benefits by decision dated June 5, 1996. 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.<sup>1</sup>

Section 8123 of the Federal Employees' Compensation Act<sup>2</sup> provides that if there is a 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.<sup>3</sup> The Board finds that a conflict did exist in the medical opinion evidence prior to the termination of appellant's compensation benefits. The conflict occurred between the opinions of Dr. Holzer, appellant's treating physician, and Dr. Killian, the Office second opinion physician, regarding the nature of the employment injury and appellant's continuing disability resulting from the employment injury. The Office did not refer appellant to an impartial medical specialist before it terminated appellant's compensation benefits on June 5, 1996. On June 12, 1996 appellant underwent further MRI and EMG evaluation of the cervical spine. In a report dated July 8, 1996, Dr. Holzer stated that appellant had undergone an MRI of the cervical spine which revealed an extruded herniated disc at C6-7 with extension of disc material behind the posterior of the C6 vertebral body with impingement upon the cervical cord. He opined that this represented a significant worsening on comparison to an MRI dated May 17, 1995. Dr. Holzer noted that appellant had also undergone EMG evaluation of the cervical spine and upper extremities which was consistent with chronic degeneration affecting the right C7 nerve roots, and EMG and nerve conduction studies of the lumbar spine and lower extremities was abnormal and was consistent with bilateral L4-5 and chronic degeneration. He concluded that as a result of appellant's employment injury she had sustained cervical and lumbar disc disease with

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<sup>1</sup> *Patricia A. Keller*, 45 ECAB 278 (1993).

<sup>2</sup> 5 U.S.C. § 8123.

<sup>3</sup> *Shirley L. Steib*, 46 ECAB 309 (1994).

radiculopathy affecting the right C5-7 nerve roots and right and left L4-5 nerve roots which caused total disability.<sup>4</sup>

The Office then determined that a conflict existed in the medical opinion evidence and referred appellant to Dr. Charles A. Pitman, a Board-certified orthopedic surgeon, for an impartial medical evaluation.

Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.<sup>5</sup>

In his report dated October 4, 1996, Dr. Pitman reviewed appellant's medical records in detail. Dr. Pitman diagnosed "status post sprain right ankle, contusion right hip and cervical and lumbar strain superimposed on preexisting degenerative arthritis." He noted that he did not find any localized nerve root irritation. Dr. Pitman concluded that appellant had a minimal partial disability and was capable of performing "office type work" six to eight hours per day. He stated that appellant's cervical sprain represented temporary aggravation of her underlying previous degenerative arthritis and that she had reached maximum benefit for treatment of the strain. He also stated that appellant's orthopedic treatment had reached maximum benefit and could be discontinued.

The Board finds that Dr. Pitman's report was ambiguous, was not well rationalized and therefore lacks probative value. While Dr. Pitman opined that appellant had minimal partial disability and could work six to eight hours a day, he did not explain what medical condition or conditions, and what limitation or limitations caused appellant to remain partially disabled. Furthermore, while Dr. Pitman stated that appellant cervical strain was a temporary aggravation of her underlying previous degenerative arthritis and that she had reached maximum medical treatment, he did not actually state that appellant's cervical sprain had ceased, and if so when. Dr. Pitman did not explain whether appellant has reached her preinjury baseline status, and if so why appellant could only work six to eight hours a day. Furthermore, while Dr. Pitman did opine that he did not believe appellant would further benefit from medical treatment, such an opinion does not necessarily mean that residuals of a condition have ceased or that disability has ceased. As Dr. Pitman's report was ambiguous and not well rationalized it does not constitute the weight of the medical opinion evidence. The Office therefore has not resolved the conflict of the medical opinion evidence regarding appellant's continuing disability, which existed in this case prior to the termination of compensation benefits.

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<sup>4</sup> The Office has not accepted that appellant sustained a back condition as a result of the employment injury.

<sup>5</sup> *Harrison Combs, Jr.*, 45 ECAB 716 (1994).

The decision of the Office of Workers' Compensation Programs dated November 9, 1996 is hereby reversed.

Dated, Washington, D.C.  
November 19, 1998

Michael J. Walsh  
Chairman

George E. Rivers  
Member

David S. Gerson  
Member