

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CAROL J. BENDER and U.S. POSTAL SERVICE,  
POST OFFICE, Omaha, Nebr.

*Docket No. 96-2677; Submitted on the Record;  
Issued September 10, 1998*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation on December 6, 1995.

On March 28, 1992 appellant, then a 48-year-old window clerk, filed a traumatic injury claim alleging that she injured her lower back while lifting a sack of mail from the bottom of an APC on March 25, 1992. The Office accepted the claim for low back strain and aggravation of degenerative disc disease. Appellant stopped work on March 26, 1992 and returned to work on March 30, 1992.

Appellant began receiving ongoing medical treatment from Dr. Frank Iwersen, a Board-certified orthopedic surgeon. In April 1992, Dr. Iwersen diagnosed low back strain with sciatica. A computerized tomography (CT) scan showed no herniated disc. Appellant underwent extensive physical therapy while continuing to work full time with restrictions of no repetitive lifting or straining and no lifting over 10 pounds.

In a June 1, 1993 fitness-for-duty evaluation report prepared for the employing establishment, Dr. D.M. Gammel, a Board-certified anesthesiologist, stated that the studies revealed mild degenerative disc disease of the lumbar spine.

In a July 20, 1993 letter, the Office asked Dr. Gammel whether or not appellant's March 1992 injury had aggravated her preexisting degenerative disease. In his July 22, 1993 reply letter, Dr. Gammel stated that the degenerative disc disease predated appellant's work injury, but that the condition was asymptomatic and had been aggravated by the injury. He opined that appellant's impairment was permanent.

Based on Dr. Gammel's report, the Office expanded the acceptance of the case to include aggravation of degenerative disease of the spine.

In a January 27, 1994 medical report, Dr. Iwersen advised the employing establishment of the treatment he had provided to appellant since April 1992. He stated that a CT scan showed a bulging disc at L4-5, but no herniation. He also indicated that there was no evidence of degenerative disc disease on the x-rays or CT scan.

On March 31, 1994 appellant filed a recurrence claim stating that her back problem had been ongoing since the original work injury of March 25, 1992.

In an September 29, 1994 letter, the Office advised appellant of the information necessary to support her recurrence claim.

In an October 19, 1994 letter, appellant described the progress of her condition since the injury. She stated that the symptoms remained in her back and right leg and that they were aggravated by repetitive movements at work. She denied any other injuries since the March 25, 1992 incident.

In a July 20, 1995 letter, the Office requested copies of the results of diagnostic tests performed on appellant. A CT scan of April 21, 1992 was submitted, which indicated a mild central disc bulging at L4-5 without herniation. Otherwise, the scan was negative.

The employing establishment submitted a copy of appellant's light-duty job.

Although the file indicates that appellant sought no medical treatment for the claimed recurrence and had not been seen by any physician since Dr. Gammel's evaluation on May 27, 1993, the Office approved the claimed recurrence for aggravation of degenerative disc disease of the spine.

The Office then referred appellant to Dr. William Hamsa, Jr., a Board-certified orthopedic surgeon, for a second opinion evaluation.

In a medical report of September 18, 1995, Dr. Hamsa noted appellant's history of injury and the problems she has experienced with her back. Appellant denied any problems with her back prior to the work injury. On examination, Dr. Hamsa noted that appellant had back pain, but no radicular symptoms were presented. He noted that appellant was working in a limited-duty job with a 10 pound lifting restriction. Dr. Hamsa diagnosed muscular ligamentous injury of the lumbar spine with some historic nonspecific neuritis in the right leg. He concurred with Dr. Iwersen that this was a soft tissue injury and that by present objective findings, appellant was doing quite well. Dr. Hamsa made no mention of degenerative disc disease.

In an October 6, 1995 letter, the Office requested Dr. Hamsa to provide an opinion on whether or not appellant had recovered from the March 25, 1992 injury.

In a letter dated October 16, 1995, Dr. Hamsa restated his diagnosis and indicated that, if he was the treating physician, he would allow her to work by pain tolerance. He additionally stated that a soft tissue injury to the back generally reaches maximum medical improvement over a period of 6 to 12 months from the time of injury.

As Dr. Hamsa failed to answer the Office's question, the Office referred appellant to Dr. John C. Goldner, a Board-certified neurologist, for another second opinion evaluation.

In a November 27, 1995 medical report, Dr. Goldner noted the history of appellant's injury, the treatment she received, the progress of her condition, the results of all tests performed and her current symptoms. Dr. Goldner indicated that his neurological examination of appellant was normal and that all the tests he performed were negative. Dr. Goldner stated that appellant presented with a history consistent with musculoskeletal low back pain caused by a March 25, 1992 lifting incident. Her right leg pain was probably also on a musculoskeletal basis, perhaps related to a temporary facet joint dislocation that had healed. X-rays and a CT scan of the lumbar spine done in April 1992 showed no significant abnormalities. There was no evidence of impairment of the central or peripheral nervous system and, from the history, no problems with the peripheral nervous system were ever present. Dr. Goldner found no evidence to substantiate a diagnosis of degenerative joint disease of the lumbosacral spine, although he indicated that at appellant's age, a degree of this could be anticipated. He opined that appellant's neurological examination was entirely normal and felt that her current musculoskeletal low back pain was related to poor conditioning brought on by lack of physical activity. There was no evidence of any active neurological abnormalities and no objective findings on examination. He felt that appellant could benefit from some type of work hardening program to improve her conditioning.

In a decision dated December 6, 1995, the Office terminated appellant's compensation benefits effective December 6, 1995 on the basis that the medical evidence established that appellant had recovered from low back strain sustained on March 25, 1992 and that she does not have degenerative disease of the spine. The Office's December 6, 1995 decision was accompanied by a letter, which explained appellant's appeal rights: her right to reconsideration before the Office under 5 U.S.C. § 8128(a), her right to a hearing under 5 U.S.C. § 8124(b), or her right to review by the Board.

In an undated letter, which the Office received on December 18, 1995, appellant requested a hearing before an Office representative.

At the May 8, 1996 hearing, appellant testified about her injury, its effects and on the various medical treatment she received, including the evaluations she was referred for. Appellant testified that she has not lost any time from work other than the few days she was off when the injury occurred. She remains on modified duty and has never gone back to her date-of-injury job. Appellant stated that she is not asking for monetary compensation; rather, she wants to continue to receive medical treatment that she feels is necessitated by her job injury.

Appellant additionally submitted three medical reports dated December 20, 1995, January 5 and April 19, 1996 from Dr. Iwersen. In the December 20, 1995 report, Dr. Iwersen stated that he examined appellant and that she was still complaining of pain in the low back with occasional recurrence of right sciatica. On examination, appellant exhibited marked tenderness over the lumbosacral and right sacroiliac areas. Lateral side bending was normal and appellant was able to straighten with moderate difficulty. He noted that straight leg raising was normal bilaterally, as were Lesegue's and Patrick's signs. Reflexes were physiologic in the legs, with no weakness with dorsiflexion of the toes. Dr. Iwersen diagnosed low back strain with intermittent sciatica.

In his January 5, 1996 medical report, Dr. Iwersen stated that appellant's current residuals are "definitely related to her previous back injury that occurred in 1992." He indicated that she should have a lifting restriction of no more than 10 pounds.

In his April 19, 1996 medical report, Dr. Iwersen notes the April 1992 injury and the difficulty appellant has experienced since then. He noted the results of the CT scan showing a bulging disc at L4-5. He felt that appellant could work, but should avoid repetitive lifting or straining and be limited to 10 pounds of lifting. He felt such restrictions were necessary because of the bulging disc and that any further strain with heavy lifting could precipitate a herniation. Dr. Iwersen noted that appellant was not currently under his care, though it was still his opinion that her duties should be restricted as far as heavy lifting and straining were concerned.

In a July 8, 1996 decision, an Office hearing representative affirmed the December 6, 1995 decision. The hearing representative found that the Office correctly terminated coverage in this case as the medical evidence failed to support the existence of any ongoing, injury-related residuals.

The Board finds that the Office met its burden of proof to terminate appellant's compensation on December 6, 1995.

In the present case, the Office accepted that appellant sustained a low back strain and aggravation of degenerative disc disease of the spine. Appellant returned to light-duty work with no wage loss, but has continued to receive medical treatment for the accepted conditions. By decision dated December 6, 1995, the Office terminated appellant's compensation benefits effective December 6, 1995 on the grounds that she had no continuing condition due to her March 25, 1992 work injury after that date and, by decision dated and finalized on July 8, 1996, the Office affirmed its December 6, 1995 decision.<sup>1</sup>

Once the Office has accepted a claim and pays compensation, it has the burden of proof of justifying termination or modification of compensation benefits.<sup>2</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>3</sup> To discharge its burden of proof, it is not sufficient for the Office to simply produce a physician's opinion negating causal relationship. As with the case where the burden of proof is upon a claimant, the Office must support its position on causal relationship with a physician's opinion, which is based upon a proper factual and medical background and which is supported by medical rationale explaining why there no longer is, or never was, a causal relationship.<sup>4</sup>

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<sup>1</sup> As appellant did not stop work due to her March 25, 1992 employment injury, entitlement to compensation for employment-related disability is not at issue in the present case.

<sup>2</sup> *Robert C. Fay*, 39 ECAB 163 (1987).

<sup>3</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989).

<sup>4</sup> *Frank J. Mela*, 41 ECAB 115, 125 (1989).

The Office terminated appellant's compensation benefits effective December 6, 1995, on the grounds that the weight of the medical evidence established that appellant had no continuing disability or residuals due to the accepted injury. At the time the Office terminated appellant's compensation benefits, the only reference to degenerative disc disease was contained in Dr. Gammel's June 1, 1993 fitness-for-duty evaluation report. Dr. Gammel diagnosed lumbosacral degenerative disease with right sciatica, stating that diagnostic studies reveal mild degenerative disease. In a supplemental report of July 22, 1993, Dr. Gammel advised that the degenerative disc disease was preexisting and asymptomatic, but became aggravated by her work injury of March 25, 1992. As stated above, in order to terminate appellant's benefits, the Office must rely on a medical report, which provides medical rationale explaining why there is no longer a causal relationship between appellant's current complaints and her employment injury. Dr. Gammel did not identify what diagnostic studies revealed the mild degenerative disc disease, his examination failed to reveal objective findings, and he did not explain the physical basis and medical reasoning which resulted in his conclusion.

In his January 27, 1994 medical report, Dr. Iwersen, appellant's treating physician, notes that appellant's June 2, 1992 examination was essentially normal and that restrictions were imposed to avoid aggravation. He further stated that there was no evidence of degenerative disc disease on x-ray or CT scan. Although in his September 18, 1995 medical report, Dr. Hamsa diagnosed muscular ligamentous injury of the lumbar spine with some historic nonspecific neuritis in the right leg, he failed to answer the question which is relevant to this case; *i.e.*, whether appellant was continuing to suffer from residuals of her work injury of March 25, 1992. In his supplemental report of October 16, 1995, which was rendered at the Office's request for a clarifying opinion, Dr. Hamsa again failed to adequately respond to the specific issues of the case; thus, his report is of limited probative value. The Office properly referred the case to another second opinion physician, Dr. Goldner.

Dr. Goldner's November 27, 1995 report has the reliability, probative value and convincing quality with respect to the relevant issue in the case and provides a proper basis for the Office's termination of appellant's compensation benefits. In an opinion dated November 27, 1995, Dr. Goldner stated that he found no evidence of active neurological abnormalities; there were no objective findings on examination and that appellant's x-rays and CT-scan showed no significant abnormalities and that there was no evidence of impairment of the central or peripheral nervous system. Dr. Goldner found no evidence to substantiate a diagnosis of degenerative disease of the lumbosacral spine. He further stated that appellant's current activities were not aggravating her condition, but that the lack of physical activity, physical therapy and conditioning were contributing to the persistence of low back symptoms. Dr. Goldner's opinion is based on a proper factual and medical history in that he had the benefit of an accurate and up-to-date statement of accepted facts, provided a thorough factual and medical history and accurately summarized the relevant medical evidence. Moreover, Dr. Goldner provided proper analyses of the factual and medical history and findings on examination, including the results of diagnostic testing and provided a medical rationale for his opinion by noting that appellant's current musculoskeletal low back pain could be solely accounted for by the poor conditioning brought on by lack of physical activity.

Thus, based on the evidence before the Office at the time the December 6, 1995 decision terminating benefits was rendered, the Office's termination of appellant's compensation benefits was proper.<sup>5</sup> After termination of compensation benefits, clearly warranted on the basis of the evidence, the burden of reinstating compensation benefits shifts to appellant.<sup>6</sup>

Following the termination of her benefits, appellant submitted three medical reports from Dr. Iwersen, which addressed appellant's pain in her lower back. In his December 20, 1995 report, Dr. Iwersen noted a normal examination and diagnosed low back strain with intermittent sciatica. In his January 5, 1996 report, Dr. Iwersen opined that appellant's current residuals were causally related to her work injury, but failed to explain the physical basis and medical reasoning for his conclusion.<sup>7</sup> In his April 19, 1996 medical report, Dr. Iwersen opined that certain restrictions on appellant's movements and a 10 pound lifting restriction were necessary because the CT scan of the lumbar spine conducted on April 1992 showed a bulging disc. However, it should be noted that the CT scan was conducted in April 1992 and in his most recent examination of appellant on December 20, 1995, there were no objective findings to substantiate appellant's complaints of pain. Accordingly, the Board finds that there is no recent objective evidence to substantiate appellant's complaints of pain to establish any residuals resulting from the original work injury of March 25, 1992 and that Dr. Iwersen's recent reports are insufficient to overcome the weight of the medical opinion evidence that fails to support the existence of any ongoing, injury-related residuals.

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<sup>5</sup> The Board notes that prior to the termination of appellant's compensation benefits, the Office failed to issue a pretermination notice. However, after the Office terminated compensation without notice, appellant had an opportunity to respond by submitting new evidence or argument and that she requested a hearing and challenged the termination. The opportunity for hearing or reconsideration by the Office, together with the Board's review on appeal, constitutes meaningful post-deprivation processes whereby the government addressed the procedural error. *Lan Thi Do*, 46 ECAB 366 (1994).

<sup>6</sup> *Gary R. Sieber*, 46 ECAB 215 (1994).

<sup>7</sup> See *Mela*, *supra* note 4.

The decisions of the Office of Workers' Compensation Programs dated July 8, 1996 and December 6, 1995 are hereby affirmed.

Dated, Washington, D.C.  
September 10, 1998

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member