

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROSA MOORE and DEPARTMENT OF VETERANS AFFAIRS,
LYONS VETERANS HOSPITAL, Lyons, NJ

*Docket No. 97-2457; Submitted on the Record;
Issued December 15, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
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 October 18, 1996.

The Board has duly reviewed the case on appeal and finds that the Office met its burden of proof to terminate appellant's compensation benefits effective October 18, 1996.

Appellant filed a claim on February 9, 1995 alleging that she sustained multiple injuries when she slipped on the ice in the performance duty. On December 26, 1995 the Office accepted that appellant sustained multiple contusions, cervical sprain, lumbosacral strain with radiculitis and bilateral internal derangement of the knee and entered appellant on the daily compensation rolls. In support of her claim for continuing disability, appellant submitted periodic reports from her treating physician, Dr. Nathan E. Doctry, an orthopedic surgeon, in which the physician indicated that appellant remained totally disabled from her regular work, had sustained permanent nerve damage and arthritis as a result of her injuries and would require epidural nerve blocks. The Office referred appellant for a second opinion evaluation with Dr. Edward A. Toriello, a Board-certified orthopedic surgeon, on May 7, 1996 who provided a history of injury and his physical findings on examination and concluded in his May 20, 1996 report that all of appellant's accepted injury-related conditions had resolved, that she no longer required medical treatment and that she could return to her regular employment duties. On August 22, 1996 the Office proposed to terminate appellant's compensation benefits on the grounds that the weight of the medical evidence, represented by the report of Dr. Toriello, established that she was no longer disabled nor had medical residuals due to her accepted employment injuries. The Office finalized this proposal by decision dated October 18, 1996, finding that appellant's disability had ceased. Subsequent to appellant's request for reconsideration, on May 2, 1997 the Office issued a merit decision in which it found that the additional evidence submitted by appellant was insufficient to warrant modification of the prior decision.

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.¹ 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.² Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.³ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.⁴

In this case, the Office found that a February 19, 1997 narrative report from Dr. Doctry, submitted by appellant after the Office's October 18, 1996 termination of benefits, contained sufficient rationale to create a conflict of medical opinion between Drs. Doctry and Toriello on the issue of whether appellant has a continuing medical condition causally related to her accepted employment injury. Section 8123(a) of the Federal Employees' Compensation Act,⁵ 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 Office referred appellant, a statement of accepted facts and a list of specific questions to Dr. Carl F. Mercurio, a Board-certified orthopedic surgeon, for an impartial medical examination. In a report dated April 25, 1997, Dr. Mercurio noted appellant's history of injury and prior medical treatment including her test results. He performed a complete physical examination, paying particular attention to appellant's back, left shoulder and knees. Dr. Mercurio diagnosed resolved accident-related strains and contusions to the lower back and to both knees, as well as nonaccident-related bilateral carpal tunnel syndrome and degenerative arthritis of both knees. He explained that the accident-related back and knee conditions, having resolved, had caused no permanent impairment and warranted no further medical treatment. Dr. Mercurio further stated that appellant's carpal tunnel syndrome was unrelated to the February 5, 1995 employment accident, and that, while the accident did cause a temporary exacerbation of appellant's underlying bilateral degenerative arthritis of the knees, this exacerbation had also resolved. Dr. Mercurio concluded that appellant had reached maximum medical improvement and was able to return to her normal employment duties.

Dr. Mercurio's report provided an extensive review of appellant's medical history and physical findings on examination and provided his reasoning for concluding that appellant was not physically disabled, was capable of returning to her date-of-injury position and did not require further medical treatment for her accepted employment injuries. Because Dr. Mercurio was the impartial specialist selected to resolve a conflict in medical opinion evidence, his well-rationalized report based on the entire case record is entitled to special weight and constitutes the

¹ *Frederick Justiniano*, 45 ECAB 491 (1994); *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

² *Gary R. Sieber*, 46 ECAB 215 (1994).

³ *Frederick Justiniano*, *supra* note 1; *Furman G. Peake*, 41 ECAB 361, 364 (1990).

⁴ *Id.*

⁵ 5 U.S.C. §§ 8101-8193, 8123(a).

weight of the medical evidence.⁶ On appeal, appellant, through counsel, asserts that because the statement of accepted facts supplied by the Office for Dr. Mercurio's review indicated only that the Office had accepted that appellant had "injured her back and knee," but did not identify all the specific accepted conditions, Dr. Mercurio's opinion was not properly based on all the factual and medical evidence of record. While the statement of accepted facts sent to Dr. Mercurio is somewhat abbreviated, a review of Dr. Mercurio's report reveals that the physician was fully aware of the specifics of appellant's accepted employment-related conditions, as well as her complete medical history. Therefore, in its merit decision on reconsideration dated May 2, 1997, the Office properly relied upon Dr. Mercurio's report to resolve the conflict in medical opinion between Drs. Doctry and Toriello and to terminate appellant's compensation benefits. The Board finds, however, that the conflict between Drs. Doctry and Toriello was created prior to the Office's October 18, 1996 decision terminating benefits, and existed at the time the Office issued its October 18, 1996 decision. As the Office had not met its burden to terminate benefits at the time of its October 18, 1996 decision, appellant remains entitled to compensation until the conflict was resolved by the April 25, 1997 opinion of Dr. Mercurio.

The decision of the Office of Workers' Compensation Programs dated May 2, 1997 is affirmed, as modified, to reflect appellant's entitlement to compensation for the period October 18, 1996 to April 25, 1997.

Dated, Washington, D.C.
December 15, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁶ *Roger Dingess*, 47 ECAB 123 (1995).