

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ETTA McMURRAY and U.S. POSTAL SERVICE,
POST OFFICE, Chicago, IL

*Docket No. 98-989; Submitted on the Record;
Issued December 2, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective December 9, 1997; and (2) whether appellant has established any permanent impairment causally related to her accepted knee, wrist, shoulder or back injuries for which she is entitled to a schedule award.

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.

On December 22, 1991 appellant, then a 55-year-old mailhandler, sustained employment-related sprains to both knees, the right wrist and the left shoulder, a lumbosacral strain and a fracture of the left wrist, for which she received appropriate compensation benefits. She was off work for two days following the incident and then returned to full-time limited-duty work. Appellant subsequently sustained recurrences of disability on October 19, 1992, June 28, 1993 and June 17, 1994, which were accepted by the Office. Following the June 17, 1994 recurrence of disability, on October 21, 1994 appellant returned to full time limited-duty work. Beginning October 26, 1994, however, appellant began working part time, four hours a day, limited duty as a modified mailhandler. The Office continued to pay appropriate wage-loss compensation based on appellant's actual earnings. Appellant did not return to full-time employment. In a decision dated October 24, 1996, the Office determined that the position of modified mailhandler fairly and reasonably represented appellant's wage-earning capacity.

In continuing support of her claim for compensation, appellant submitted regular medical reports and progress notes from her treating physician, Dr. Jonathan Costa, a Board-certified physiatrist. In these reports, Dr. Costa consistently listed appellant's physical restrictions and stated that she is capable of working only four hours a day but despite specific requests from the Office, he did not provide any rationale or explanations for his conclusions, other than occasionally noting that appellant complains of increased pain after four hours of work. On October 30, 1996 in order to obtain a more complete picture of appellant's health, the Office referred appellant, along with a statement of accepted facts, a set of questions and the medical record, to Dr. Julie M. Wehner, a Board-certified orthopedic surgeon, for a second opinion

evaluation. Following the receipt of Dr. Wehner's November 20, 1996 report, in which she opined that appellant could work eight hours a day without restrictions, the Office provided Dr. Costa an opportunity to provide a more detailed report in response to Dr. Wehner's conclusions. By letter received September 24, 1997, Dr. Gary Yarkony, a Board-certified psychiatrist and a partner of Dr. Costa's, who had taken over appellant's care, stated that while many of appellant's injuries had resolved, she continued to suffer from myofascial pain. Upon receipt of Dr. Yarkony's response, the Office then referred appellant to Dr. Ira Kornblatt, a Board-certified orthopedic surgeon, to resolve the conflict between the opinion of Dr. Wehner and appellant's treating physicians, Drs. Costa and Yarkony. In addition, in response to a claim for a schedule award filed by appellant on March 24, 1992, the Office asked Dr. Kornblatt to determine whether appellant had any permanent impairments as a result of her accepted injuries.¹

Based on Dr. Kornblatt's report, by letter dated November 7, 1997, the Office proposed to terminate appellant's compensation benefits. In response to the Office's proposed termination, appellant submitted a medical report from Dr. Michelle Gittler, a Board-certified psychiatrist. In a decision dated December 9, 1997, the Office found that the weight of the medical evidence continued to rest with Dr. Kornblatt and terminated appellant's medical and compensation benefits, effective that day. By letter dated December 27, 1997, appellant requested reconsideration of the Office's decision and stated that she was submitting additional medical evidence in support of her request. However, no additional medical evidence was received by the Office. In a decision dated January 12, 1998, the Office found appellant's request for reconsideration insufficient to warrant merit review of the prior decision.

In a separate decision dated December 9, 1997, the Office denied appellant's claim for a schedule award on the grounds that the weight of the medical evidence did not establish that she has any ratable permanent impairment as a result of her accepted injuries.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has determined that an employee has disability causally related to his or her employment, the Office may not terminate compensation without establishing that the disability has ceased or that it was no longer related to the employment.²

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 a specialist, if sufficiently well rationalized and based on proper factual background, must be given special weight.³ Here the Office determined that a conflict of medical opinion existed between appellant's treating physicians and the physician who provided a second opinion for the Office. The Office then referred appellant, along with the medical

¹ By letter dated June 20, 1997, the Office advised appellant of the evidence needed to establish a claim for a schedule award and forwarded to her the appropriate evaluation forms for completion by her treating physician. In her response dated July 29, 1997, appellant informed the Office that her treating physician had declined to perform such a schedule award evaluation and asked the Office to refer her to another physician for this purpose. Therefore, the Office requested that Dr. Kornblatt address the issue of permanent impairment in his report.

² See *Patricia A. Keller*, 45 ECAB 278 (1993).

³ See *Roger Dingess*, 47 ECAB 123 (1995); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Edward E. Wright*, 43 ECAB 702 (1992).

record, a statement of accepted facts with a job description and a list of questions, to Dr. Kornblatt, a Board-certified orthopedic surgeon, to resolve the conflict.

In a report dated October 30, 1997, Dr. Kornblatt noted appellant's history of injury and subjective complaints and, after a complete physical examination and review of the medical record, noted that despite appellant's complaints that she hurt everywhere, she "exhibited multiple inconsistencies throughout the course of the examination with marked exaggerated pain behavior." He concluded that there were no objective findings to substantiate appellant's ongoing subjective complaints, that she had made a complete recovery and that she is capable of resuming her normal and preexisting job activities without restrictions and without further medical care.

In response to Dr. Kornblatt's report and the Office's proposed termination based thereon, appellant submitted a report, dated November 20, 1997 from Dr. Michelle Gittler, a Board-certified physiatrist. In her report Dr. Gittler stated that she had reviewed both Dr. Kornblatt's findings and the Office's notice of proposed termination. After performing her physical examination, Dr. Gittler stated:

"On my physical exam[ination], things that are of note are, in fact, bilaterally knees demonstrate no instability. There is no medial lateral instability. There is no anterior drawer sign and so in that I concur with both orthopedic surgeons. She does demonstrate increased pain behavior with moving on to the bed and my palpation. In trying to get her to lay back and flex her hips at 90 degrees so that we can assess her abdominal muscles, she is unable to lay back and flex her legs at 90 degrees and lower them slowly. This, to me, indicates abdominal musculature weakness. When evaluating the recruitment for the hip extensors, the recruitment pattern bilaterally are the contralateral paraspinals followed by the hamstrings, the gluteus maximus and the ipsilateral paraspinals. Of note, the normal recruitment pattern with the gluteus maximus, hamstrings, ipsilateral paraspinals and then the contralateral paraspinals. Additionally, in evaluating her abductors, she also demonstrated some abnormal recruitment pattern with what I feel is weakness of her abductors."

Dr. Gittler recommended that appellant undergo a trial of physical therapy to address the issue of the abnormal recruitment, which would coincide with a sacroiliac dysfunction and to upgrade the muscle strength in appellant's hip extensors and abductors. She further stated that she "would have to agree that objective findings that would be usually seen in regard to spine dysfunction as evaluated by a neurosurgeon or orthoped perhaps are not present." Dr. Gittler recommended that appellant continue to perform limited-light duty, four hours a day, until her condition could be further assessed following physical therapy.

While Dr. Gittler does describe some musculature weakness and abnormal recruitment patterns, she does not indicate that appellant's specific employment related injuries have not resolved and further does not indicate that appellant has any ongoing physical disability as a result of her accepted conditions. As Dr. Gittler does not indicate in her report, that appellant has any continuing disability on the basis of her accepted medical conditions, her report is insufficient to outweigh, or to create a conflict with, the well rationalized report of

Dr. Kornblatt.⁴ Therefore, the Board finds appellant had no employment-related disability on or after December 9, 1997 and the Office met its burden of proof to terminate appellant's compensation benefits on that date.

The Board further finds that appellant has not established any permanent impairment causally related to her accepted injuries for which she is entitled to a schedule award.

Section 8107 of the Federal Employees' Compensation Act⁵ and its implementing regulations⁶ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use of specified members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fourth edition, 1993) has been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating losses.⁷

In the present case, at appellant's request, the Office asked Dr. Kornblatt to include in his report, any findings of permanent impairment causally related to appellant's conditions, for the purpose of determining appellant's entitlement to a schedule award. In his October 30, 1997 report, with respect to appellant's shoulders Dr. Kornblatt stated that despite the fact that appellant consciously guarded against mobility, he was of the opinion that she has full range of motion bilaterally including overhead elevation, abduction and internal and external rotation. He further stated that strength of her shoulder muscles was impossible to evaluate as appellant did not exhibit significant attempts when muscle testing was carried out. Dr. Kornblatt's examination of appellant's wrists revealed no local swelling with dorsiflexion to 60 degrees bilaterally, palmar flexion to 70 degrees bilaterally, radial deviation 20 degrees and ulnar deviation 30 degrees bilaterally. There was no local swelling or deformity of the hands and appellant was noted to have full range of motion. A review of appellant's x-rays revealed evidence of a healed fracture in the left wrist with no significant evidence of arthritis. Again, Dr. Kornblatt found appellant's strength impossible to evaluate. After examining appellant's knees, he noted that there was no local swelling and that range of motion was full from extension to 140 degrees of flexion bilaterally. Both knees were found to be stable to anterior, posterior, varus and valgus stress. Meniscal signs were negative and thigh circumference was equal bilaterally. X-rays showed no fracture or significant arthritis.

A review of the fourth edition of the A.M.A., *Guides* reveals that Dr. Kornblatt did not provide any findings from which any rating of permanent impairment could be established. His finding of exaggerated and inconsistent pain responses and full range of wrist, knee and shoulder motion indicates that appellant did not have any ratable permanent impairment from her accepted

⁴ *Id.*

⁵ 5 U.S.C. § 8107(c).

⁶ 20 C.F.R. § 10.304.

⁷ *Quincy E. Malone*, 31 ECAB 846 (1980).

employment injury.⁸ With respect to appellant's accepted back condition, the Board notes that no schedule award is payable for a member, function or organ of the body not specified in the Act or in the implementing federal regulations.⁹ This principle applies to body members that are not enumerated in the schedule award provision before the 1974 amendment¹⁰ as well as to organs that are not enumerated in the regulations promulgated pursuant to the 1974 amendment.¹¹ The Board has noted that the back is specifically excluded from the definition of "organ" under the Act and therefore, no schedule award is payable for impairment to the spine.¹² Appellant, therefore, has not established any ratable impairment for which she is entitled to a schedule award.

The decisions of the Office of Workers' Compensation Programs dated January 12, 1998 and both decisions of the Office dated December 9, 1997 are hereby affirmed.

Dated, Washington, D.C.
December 2, 1999

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

⁸ See A.M.A, *Guides* (4th ed. 1993) Figure 26, p. 36; Figure 29, p. 38; and Table 41, p. 78.

⁹ *William Edwin Muir*, 27 ECAB 579, 581 (1976); see *Terry E. Mills*, 47 ECAB 309 (1996) (listing the members and organs of the body for which the loss or loss of use is compensable under the schedule award provisions).

¹⁰ The Act itself specifically excludes the back from the definition of "organ." 5 U.S.C. § 8101(19).

¹¹ *John F. Critz*, 44 ECAB 788, 792-93 (1993) (brain disorder); *Ted W. Dietderich*, 40 ECAB 963, 965 (1989) (gallbladder); *Thomas E. Stubbs*, 40 ECAB 647, 649 (1989) (spleen).

¹² See *James E. Mills*, 43 ECAB 215 (1991).