

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DEBORAH A. SANTIAGO and U.S. POSTAL SERVICE,
SOUTHEASTERN GENERAL MAIL FACILITY, Southeaster, PA

*Docket No. 99-957; Submitted on the Record;
Issued December 27, 1999*

DECISION and ORDER

Before WILLIE T.C. THOMAS, 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 effective April 27, 1997.

The Board has duly reviewed the case record and finds that the Office improperly terminated appellant's compensation.

On May 31, 1998 appellant, then a 29-year-old distribution clerk, sustained an employment-related thoracolumbar strain and herniated disc at L4-5 for which she underwent surgery. Appellant stopped work that day and received appropriate continuation of pay and compensation. She returned to work for brief periods in 1983 and 1986 and has not worked since October 28, 1986. The Office continued to develop the claim and, finding that a conflict in the medical evidence existed between the reports of appellant's treating Board-certified orthopedic surgeon, Dr. John D. Caggiano, and Dr. Steven J. Valentino, an osteopathic orthopedic surgeon who had provided a fitness-for-duty examination for the employing establishment, the Office referred appellant to Dr. Robert A. Ruggiero, a Board-certified orthopedic surgeon, who provided an August 25, 1995 report. By letter dated February 21, 1996, the Office informed appellant that it proposed to terminate her compensation, based on the opinions of Drs. Ruggiero and Valentino. By letter dated March 18, 1996, appellant disagreed with the proposed termination and submitted a March 15, 1996 report from Dr. Caggiano.

In an April 2, 1996 decision, the Office terminated appellant's compensation, effective April 27, 1996. Appellant timely requested a hearing, and by decision dated June 20, 1996, an Office hearing representative remanded the case to the Office because it had not considered Dr. Caggiano's March 15, 1996 report. In a July 19, 1996 decision, the Office again terminated appellant's compensation effective April 27, 1996. After consideration of Dr. Caggiano's report, the Office again credited the opinions of Drs. Valentino and Ruggiero. On August 16, 1996 appellant requested a hearing which was held on February 10, 1997. At the hearing she testified about her condition and submitted a February 6, 1997 report from Dr. Caggiano. By decision

dated April 10, 1997 and finalized April 11, 1997, an Office hearing representative affirmed the prior decision.

On November 18, 1997 appellant, through counsel, requested reconsideration and submitted a September 18, 1997 report from Dr. Caggiano and an October 21, 1997 electromyographic (EMG) study. By letters dated January 12 and 29, 1998, the Office requested that Dr. Ruggiero submit a supplementary report. Getting no response and finding that a conflict remained, by letter dated May 7, 1998, the Office referred appellant, along with the medical record, a statement of accepted facts and a set of questions, to Dr. Harvinder Kohli, a Board-certified neurologist. In a report dated June 2, 1998, Dr. Kohli recommended that appellant undergo a magnetic resonance imaging (MRI) scan. An Office medical adviser provided a June 29, 1998 report and the MRI scan was completed on July 23, 1998. The Office medical adviser provided an October 26, 1998 report and, by decision dated October 26, 1998, the Office denied modification of its prior decision, based on the review by the Office medical adviser. The instant appeal follows.

The relevant medical evidence includes an April 25, 1995 report of a fitness-for-duty examination in which Dr. Valentino diagnosed subjective low back pain and advised that appellant's physical examination was completely normal and she had completely recovered from the employment injury. He opined that she could work in a medium-duty capacity and for eight hours per day. In an August 25, 1995 report, Dr. Ruggiero, an Office referral physician, advised that appellant's examination was normal with no evidence of radiculopathy or residual problems from the employment injury. He opined that appellant's only disabling medical condition was her morbid obesity and concluded that she could perform the duties of a distribution clerk with a weight restriction of 20 pounds.

Dr. Caggiano submitted numerous reports including a work capacity evaluation dated September 18, 1995 in which he provided restrictions to appellant's activity and advised that she could work four hours per day limited duty. In a March 15, 1996 report, Dr. Caggiano reviewed the reports of Drs. Valentino and Ruggiero and disagreed with their conclusions, stating:

“As I follow [appellant] on a frequent basis, she has consistently related to me symptoms that are caused by radiculopathy from her lumbar spine on the left side. As you know, [appellant] has had surgery in this area and I do not think we could find her condition unique in that she has not suffered complete recovery from her problem as a result of this surgery. I think that the termination of her compensation based on these two rather superficial reports is unwarranted....”

In a February 6, 1997 report, Dr. Caggiano advised that appellant's left-sided sciatica had persisted for a number of years, that the 1984 surgery was unsuccessful in relieving her symptoms and that she currently ambulated with a cane and was unemployable. In clinic notes dated from

September 18 to November 4, 1994, Dr. Caggiano noted positive EMG findings¹ and opined that she was totally disabled.

Dr. Kohli provided a report dated June 2, 1998 in which he noted the history of injury and appellant's complaints of severe back pain. Physical examination revealed some impairment of superficial sensation in the left L5 nerve root distribution suggestive of L5 sensory radiculopathy on the left side which he advised was further supported by the October 21, 1997 EMG report.² He concluded that she was unlikely to improve with further conservative treatment and recommended an MRI scan or computerized tomography (CT) scan with myelogram of the lumbosacral spine to see if she had a remnant of the disc or scar tissue causing impingement of the L5 nerve root. He concluded that she could not perform any physical activities because of the severe pain she was having. In an attached work capacity evaluation, Dr. Kohli advised that appellant could not work.

In a June 29, 1998 report, an Office medical adviser stated that if the MRI scan or CT scan proved negative for scarring or disc fragment, there would not be an objective basis for appellant's complaint of severe pain and her mild objective findings should not preclude her from work. A July 23, 1998 MRI scan of the lumbar spine demonstrated that appellant was status post a right L4-5 laminectomy with findings of mild disc desiccation at L3-4 and L5-S1 and mild degenerative facet arthropathy, left, at L4-5. In an October 26, 1998 report, the Office medical adviser stated that EMG studies dated June 24, 1983 and October 21, 1987 demonstrated mild, chronic L5 radiculopathy, with the most recent test showing mild improvement. The Office medical adviser stated that the June 24, 1983 EMG, taken together with the operative report of an osteophyte, indicated that the radiculopathy present in June 1983 preexisted the May 31, 1983 employment injury, as well as the operative finding of lateral recessed stenosis with long sloping lamina at L5 with an osteophytic component. The Office medical adviser advised that the progression of this preexisting disease, in conjunction with appellant's morbid obesity, caused her current condition. The Office medical adviser concluded that the July 23, 1998 MRI scan was consistent with these conclusions as it demonstrated degenerative arthritic changes which were naturally occurring.

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.³ 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

¹ The record contains the results of an October 21, 1997 EMG study performed by Dr. Robert J. Krebs but does not contain an opinion from Dr. Krebs regarding appellant's findings.

² Dr. Kohli advised that the EMG demonstrated changes of chronic denervation in the left anterior tibial and the extensor digitorum brevis and also in the paraspinal muscles.

³ See *Patricia A. Keller*, 45 ECAB 278 (1993).

opinion of such a specialist, if sufficiently well rationalized and based on a proper factual background and must be given special weight.⁴

Initially the Board notes that Office procedures provide that a physician who performed a fitness-for-duty examination of the claimant for the employing establishment may not be considered a second opinion specialist for purposes of creating a conflict in medical evidence or for reducing or terminating benefits based on weight of medical evidence.⁵ The Office was, therefore, incorrect in finding that a conflict existed between the opinions of Dr. Valentino, who provided a fitness-for-duty examination and Dr. Caggiano. Dr. Ruggiero was, thus, a second-opinion examiner. The Board, however, finds that his opinion, together with that of Dr. Caggiano, then created a conflict in medical opinion, and the Office properly referred appellant to Dr. Kohli to resolve the conflict.

The Board further finds that a conflict in medical evidence remains with respect to whether appellant suffers from any residuals or disability of the May 31, 1983 employment injury. When the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in medical opinion evidence and the opinion from such a specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the impartial specialist for the purpose of correcting the defect in the original report.⁶ In this case, in his June 2, 1998 report, Dr. Kohli advised that appellant could not work and recommended that she undergo an MRI scan examination to assess the degree of employment-related disability. Upon securing the MRI scan, the Office did not secure a supplementary report from Dr. Kohli and, instead, relied on the opinion of an Office medical adviser in its October 26, 1998 decision. As the Office improperly based its decision to terminate appellant's compensation on the opinion of the Office medical adviser, the conflict in medical opinion evidence remains unresolved and the Office did not meet its burden of proof to terminate appellant's compensation benefits.

⁴ *Roger Dingess*, 47 ECAB 123 (1995).

⁵ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.9b (March 1994); *Mary L. Barragy*, 47 ECAB 285 (1996); *John Watkins*, 47 ECAB 597 (1996).

⁶ *Mary E. Jones*, 40 ECAB 1125 (1989).

The decision of the Office of Workers' Compensation Programs dated October 26, 1998 is hereby reversed.

Dated, Washington, D.C.
December 27, 1999

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member