

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of BEVERLY BYRUM and U.S. POSTAL SERVICE,  
POST OFFICE, Orlando, Fla.

*Docket No. 97-1067; Submitted on the Record;  
Issued February 17, 1999*

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DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's wage-loss compensation benefits effective March 2, 1996 on the grounds that her work-related disability had ceased as of that date; (2) whether the Office properly denied appellant's March 26, 1996 request for an oral hearing on the grounds that it was untimely filed; and (3) whether the Office properly denied appellant's October 23, 1996 request for an oral hearing on the grounds that appellant had already been granted reconsideration.

The procedural history of the case is as follows. The Office accepted that on August 17, 1993, appellant, then a 38-year-old mail handler, sustained a right shoulder strain, cervical sprain, and aggravation of a herniated nucleus pulposus at C6-7, requiring anterior cervical microdiscectomy with fusion at C6-7 on the right on October 13, 1994,<sup>1</sup> while pushing an overloaded cart. Appellant's job required lifting up to 70 pounds, reaching above the shoulder, bending and stooping, pushing and pulling. After the injury appellant worked part-time limited duty from October 4, 1993 through May 16, 1994, stopped work and did not return. She received appropriate compensation benefits.

By notice dated January 23, 1996, and decision finalized February 23, 1996, the Office terminated appellant's wage-loss compensation benefits effective March 2, 1996 on the grounds that her work-related disability had ceased by that date. The Office noted that "conservative medical treatment" would continue to be authorized. The Office found that the weight of the medical evidence rested with Dr. Lawrence Kurz, a Board-certified orthopedic surgeon and

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<sup>1</sup> A March 24, 1994 cervical magnetic resonance imaging (MRI) scan showed a "mild diffuse annular bulge at C5-6, with "right lateral disc protrusion at C6-7 with mild impression on the ventral thecal sac and right C7 nerve root sleeve. Physical therapy in June 1994 did not alleviate appellant's symptoms. In a December 8, 1994 report, Dr. Jacques N. Farkas, a Board-certified neurosurgeon, noted the October 13, 1994 "anterior cervical microdiscectomy and interbody fusion at C6-7 using bone allograft." He diagnosed a stable recovery with complaints of pain.

second opinion physician, and Dr. Jerome Ciullo, an attending Board-certified orthopedic surgeon and shoulder specialist. The Office noted that Dr. John J. Maltese, Jr., an attending Board-certified physiatrist, did not provide adequate rationale explaining how and why the accepted injuries would continue to cause disability for work.<sup>2</sup>

In a March 26, 1996 letter, appellant requested an oral hearing. The Office denied appellant's request by decision dated April 29, 1996, on the grounds that it was not timely filed within 30 days of the Office's February 23, 1996 decision. The Office conducted a limited review, and further denied the request on the grounds that the issue involved could be addressed equally well by requesting reconsideration, and submitting new evidence establishing a work-related disability on and after March 2, 1996.<sup>3</sup>

In a July 23, 1996 letter, appellant again requested reconsideration. She enclosed a June 29, 1996 report from Dr. Maltese, stating that appellant had been disabled for work since May 1994, and reiterating that a functional capacity evaluation demonstrated disability for work and the need for a functional recovery program as she had remained symptomatic for two years after surgery.

By decision dated October 17, 1996, the Office denied appellant's request for modification on the grounds that the evidence submitted in support thereof was insufficient to warrant modification of the prior decision. The Office found that Dr. Maltese's June 29, 1996 report did not contain sufficient medical rationale or new clinical findings supporting continuing disability related to the accepted injuries.

Appellant disagreed with this decision, and in an October 23, 1996 letter requested an oral hearing before a representative of the Office's Branch of Hearings and Review. By decision dated November 15, 1996, the Office denied appellant's request for an oral hearing, on the grounds that appellant had already requested and received reconsideration. The Office conducted a limited review, and further denied appellant's request on the grounds that the issue involved could be addressed equally well by requesting reconsideration and submitting new evidence sufficient to warrant modification of the prior decision.

Regarding the first issue, the Board has carefully reviewed the entire case record and the issues involved, and finds that the Office improperly terminated appellant's wage-loss compensation benefits effective March 2, 1996, as there is an outstanding conflict of medical opinion.

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<sup>2</sup> In February 23, 1996 reports received following the issuance of the Office's February 23, 1996 decision, Dr. Maltese noted that because physical therapy had not improved appellant's condition and she had been off work for one-and-a-half years, she required a functional capacity evaluation to determine her functional abilities and restrictions prior to returning to work.

<sup>3</sup> In a May 21, 1996 report, Dr. Maltese again recommended a functional capacity evaluation with possible work hardening to determine if appellant was capable of returning to work.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.<sup>4</sup>

In this case, the Office based its termination on the opinion of Dr. Lawrence Kurz, a Board-certified orthopedic surgeon and second opinion physician. In a June 29, 1995 report, Dr. Kurz stated that the record was too incomplete to render a determination on causal relationship, and that appellant was a poor historian.<sup>5</sup> He found objective abnormalities of the cervical spinal region: 30 percent loss of rotation; limited flexion and extension; a kyphosis at C6-7 by May 1995 x-ray. In a July 13, 1995 report, Dr. Kurz also noted “very significant limitation” of cervical extension.<sup>6</sup> In an August 17, 1995 report, Dr. Kurz recommended no further treatment for appellant’s neck.

The Board finds that there is a conflict of medical opinion between Dr. Maltese,<sup>7</sup> an attending physiatrist, and Dr. Kurz. Both physicians found objective abnormalities of the cervical spine related to the accepted aggravation of herniated nucleus pulposus at C6-7 and subsequent microdiscectomy. However, as will be discussed below, Dr. Maltese opined that appellant remained disabled for work due to these abnormalities, while Dr. Kurz stated that appellant did not require further treatment for her neck.

The Board notes that both physicians also observed objective abnormalities of appellant’s right shoulder. Dr. Maltese opined that appellant had a torn right rotator cuff with tendinitis,<sup>8</sup> while Dr. Kurz ultimately opined that there was only tendinitis and no tear.<sup>9</sup> Dr. Maltese also referred appellant to Dr. Ciullo, an orthopedic surgeon and shoulder specialist, who opined that

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<sup>4</sup> *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

<sup>5</sup> The record indicates that appellant has a severe hearing loss and reads lips to communicate.

<sup>6</sup> July 21, 1995 EMG (electromyogram) and NCV (nerve conduction velocity) tests, showed no neuropathic or myopathic disease in the area sampled.

<sup>7</sup> In a February 6, 1995 report, Dr. Mazen Hakim, an attending neurologist, diagnosed “[c]hronic neck and arm pain status post cervical spine surgery for C6-7 herniated disc.” He prescribed medication and referred her to Dr. Maltese, a physiatrist.

<sup>8</sup> In an August 15, 1995 report, Dr. Maltese noted that a cervical and right shoulder MRI showed a mild disc bulge and possible rotator cuff tear.

<sup>9</sup> In a June 29, 1995 report, Dr. Kurz found objective impairments of the right shoulder: limited external rotation and abduction; positive drop arm test; weakness in the right trapezius and deltoid; tenderness of the subacromial bursa; torn right rotator cuff by MRI.

appellant's right shoulder pathologies were within normal limits.<sup>10</sup> The Office relied in part on Dr. Ciullo's opinion in terminating appellant's compensation benefits. However, the Office accepted only that appellant sustained a right shoulder strain, and not tendinitis or a rotator cuff tear. Therefore, Dr. Ciullo's opinion on shoulder conditions other than the accepted strain is not relevant, and the Office should not have relied on it in terminating appellant's compensation benefits.

In May 5, 1995 reports, Dr. Maltese provided a history of injury and treatment, noted objective findings of decreased cervical range of motion, and diagnosed "cervical radiculopathy, status post surgery." He stated that appellant remained disabled for work due to the August 17, 1993 injuries.<sup>11</sup> In the August 22, 1995 reports, Dr. Maltese noted his disagreement with Dr. Kurz's clinical assessment, and diagnosed cervical radiculopathy with disc bulging. Dr. Maltese again disagreed with Dr. Kurz in a January 26, 1996 report recommending a physical therapy and functional recovery program for appellant's neck, as "her symptoms have been ongoing over the past two years without significant improvement."<sup>12</sup> Dr. Kurz opined that appellant did not require further treatment for her neck.

Thus, Dr. Kurz opined that appellant could return to work with restrictions, while Dr. Maltese explained that appellant remained disabled due to the accepted injuries, and would require a rehabilitation program before a return to work could be considered. The two physicians disagree on the fundamental issue in the case, whether appellant remains disabled for work due to the accepted injuries.<sup>13</sup> Therefore, the Office's February 23, 1996 decision terminating appellant's wage-loss compensation benefits will be reversed based on the conflict of medical opinion. The second and third issues relating to the Office's denial of appellant's request for an oral hearing are rendered moot by the reversal of the February 23, 1996 decision.

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<sup>10</sup> On August 22, 1995 Dr. Maltese referred appellant to Dr. Ciullo, an orthopedic surgeon and shoulder specialist, and prescribed medication. Dr. Ciullo submitted an October 5, 1995 report finding a "reproducible click" in the right shoulder "from external rotation towards internal rotation in the last 45 degrees to a neutral position." He noted x-rays findings of a "very minimal change with a projection of the inferior clavicle about [one] mm into the supraspinatus outlet." Dr. Ciullo diagnosed a periscapular muscle spasm. Dr. Ciullo obtained an arthrogram, with normal results. In a December 6, 1995 report, Dr. Ciullo stated that appellant did not require work restrictions due to her shoulder as her problem was "postural, and there is no structural damage." He recommended physical therapy, which appellant underwent in December 1995. In a February 6, 1996 report, Dr. Ciullo stated an impression of early acromioclavicular joint irritation, with cystic changes by x-ray on the clavicular side. He recommended additional physical therapy to mobilize the acromioclavicular joint, with arthroscopy recommended if appellant remained symptomatic to debride the end of the clavicle. Dr. Ciullo restricted overhead activities due to acromioclavicular pain in the right shoulder on reverse extension, hyperextension and overhead positions.

<sup>11</sup> Appellant underwent physical therapy for neck and right shoulder pain in May and June, 1995.

<sup>12</sup> In a February 20, 1996 letter, the employing establishment directed appellant to report for duty on February 26, 1996. Appellant responded by March 28, 1996 letter, stating that she could not return to work as she was under medical treatment. She enclosed a March 7, 1996 note from Dr. Charles B. Goss, an attending osteopath, who diagnosed "major depressive disorder." Appellant submitted physical therapy notes from January to February 1996.

<sup>13</sup> Also, Dr. Kurz stated that appellant required no further treatment for her neck, while Dr. Maltese repeatedly set forth the medical reasons why further physical therapy and medications were necessary to treat the accepted cervical spine condition.

The decision of the Office of Workers' Compensation Programs dated February 23, 1996 is hereby reversed. The decisions of the Office dated November 15, October 17 and April 29, 1996 are hereby set aside.

Dated, Washington, D.C.  
February 17, 1999

George E. Rivers  
Member

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member