

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KAREN T. PISCOPO and U.S. POSTAL SERVICE,
POST OFFICE, Flushing, N.Y.

*Docket No. 97-1398; Submitted on the Record;
Issued January 25, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on the grounds that she had no further disability causally related to her accepted employment injury; and (2) whether the Office properly denied appellant's request for a hearing under 5 U.S.C. § 8124.

On December 12, 1994 appellant filed an occupational disease claim alleging that she sustained carpal tunnel syndrome and a disc injury due to factors of her federal employment. The Office accepted appellant's claim for cervical radiculopathy and disc herniations at C4-5 and C5-6. Appellant returned to modified duty on November 20, 1994; however, on April 28, 1995 she sustained a recurrence of disability. The Office placed appellant on the periodic rolls.

Appellant received treatment following her employment injury from Dr. Roy M. Shanon, a Board-certified internist. Dr. Shanon referred appellant for a magnetic resonance imaging (MRI) study and electromyogram (EMG). The MRI study, performed on May 4, 1995, revealed "[d]isc herniations at C4-5 and C5-6, centrally placed, impinging the dural sac." In an office visit note dated May 6, 1995, Dr. Shanon interpreted the EMG as showing "early cervical radiculopathy, bilaterally at C5 and C6."

In a report dated August 28, 1995, Dr. Shanon noted that appellant had a history of a November 22, 1994 injury to her neck and wrist and diagnosed documented cervical radiculopathy, lower back pain and a generalized anxiety disorder. He opined that appellant was currently totally disabled from her employment due to her inability to stand for long periods and related that "[t]here appears to be a causal relationship between the initial injury while on the job as well as the reexacerbation contributing to her cervical radiculopathy and lower back pain as well as her generalized anxiety disorder."

In a form report dated December 9, 1995, Dr. Shanon diagnosed cervical radiculopathy and low back pain and checked "yes" that the condition was due to the injury for which appellant

claimed compensation. He found that appellant was totally disabled and noted that she was currently undergoing chiropractic treatment.

In a follow-up report dated March 29, 1996, Dr. Shanon stated that he began treating appellant on November 26, 1994 after she injured her neck in an employment injury. He found that an MRI study, dated May 3, 1995, revealed cervical disc herniations and an EMG dated May 8, 1995 revealed bilateral cervical radiculopathy at C5-6. He noted his continuing treatment of appellant for neck pain and paresthasias of the hands and diagnosed cervical radiculopathy. Dr. Shanon found that appellant could not “do any heavy lifting, bending or lift objects greater than 20 [pounds].”

By letter dated April 16, 1996, the Office referred appellant, together with the case record and a statement of accepted facts, to Dr. William Bloom, a Board-certified neurosurgeon, for a second opinion evaluation.

In a report dated May 3, 1996, Dr. Bloom stated that appellant related a history of pain and stiffness in her neck, arm and lower back after lifting, pulling and pushing heavy items at work. Dr. Bloom questioned Dr. Shanon’s diagnosis of cervical radiculopathy based on his lack of corresponding motor, sensory or reflex findings. He further opined that the May 3, 1995 MRI study showed no trauma or compression of the nerve roots or spinal cord. He diagnosed resolved cervical and lumbar sprain with no evidence of current neurological problems. In a work restriction evaluation dated May 21, 1996, Dr. Bloom found that appellant could work for eight hours per day with no restrictions.

By letter dated May 21, 1996, the Office advised appellant that it proposed to terminate her benefits on the grounds that she had no further disability due to her accepted employment-related conditions.

In a follow-up report dated June 5, 1996, Dr. Shanon discussed the results of prior objective tests and diagnosed documented C5-6 cervical radiculopathy, documented herniated cervical disc disease, lower back pain and headaches. He stated that appellant “has a permanent chronic condition related to her herniated discs and radiculopathy for which she is currently taking a tricyclic anti[-]depressant for neuropathic pain.”

By decision dated June 24, 1996, the Office terminated appellant’s compensation benefits and authorization for medical treatment.

By letter dated July 23, 1996 and postmarked July 25, 1996, appellant requested a hearing before an Office hearing representative.

In a decision dated December 4, 1996, the Office denied appellant’s request for a hearing as untimely.

The Board finds that the Office failed to meet its burden of proof to terminate appellant’s compensation benefits.

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.¹ The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.² The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.³

Dr. Bloom, a Board-certified neurosurgeon and Office referral physician, based his opinion on a proper history of injury, a review of the medical records and the results on physical examination. He concluded after reviewing the evidence that appellant had a resolved cervical and lumbar strain and could resume her regular employment. Dr. Bloom based his conclusion on what he interpreted as a lack of objective medical findings to support a diagnosis of cervical radiculopathy.

Dr. Shanon, a Board-certified internist and appellant's attending physician, based his finding that appellant had continued disability due to her accepted employment-related condition of cervical radiculopathy on her complaints of pain as well as the results of diagnostic studies.

The Board finds that there is a conflict in the medical opinion evidence between Dr. Blount, the Office second opinion physician who found no objective findings supporting appellant's continued disability and Dr. Shanon, appellant's attending physician, who concluded that she had continued restrictions based on objective studies.

Section 8123 of the Federal Employees' Compensation Act⁴ provides, "If there is a 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." As there is an existing conflict of medical opinion evidence regarding the extent of appellant's disability and medical residuals, the Office failed to meet its burden of proof to terminate appellant's benefits.⁵

¹ *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

² *Id.*

³ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁴ 5 U.S.C. §§ 8101-8193.

⁵ In view of the Board's disposition of the first issue, the issue of whether the Office properly denied appellant's request for a hearing under 5 U.S.C. § 8124 is moot.

The decisions of the Office of Workers' Compensation Programs dated June 24, 1996 is hereby reversed.

Dated, Washington, D.C.
January 25, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member