

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of FRANK J. RUBINO and U.S. POSTAL SERVICE,  
POST OFFICE, Philadelphia, Pa.

*Docket No. 97-829; Submitted on the Record;  
Issued June 4, 1999*

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DECISION and ORDER

Before DAVID S. GERSON, 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 benefits effective December 10, 1995.

The Office accepted that appellant, then a 39-year-old mail clerk, sustained an injury to his back on November 3, 1980 when he lifted a mail tray and bent over to place it on a truck. Appellant stopped work on the date of injury, returned to work on July 15, 1981 and stopped work again on June 19, 1982. Appellant has not returned to work since. The Office accepted the claim for aggravation of degenerative disc disease at the L5-S1 level and aggravation of left sciatica and paid appropriate compensation.

In order to determine the nature and extent of disability, the Office referred appellant to Dr. Henry Wieder, a Board-certified orthopedic surgeon, for a second opinion examination. In a June 3, 1994 report, Dr. Wieder opined that appellant's disability is primarily attributable to his advanced degenerative spondylosis and spinal stenosis which was symptomatically aggravated by the work-related episode of November 3, 1980 and his occupational activities over a long period of time. He indicated that appellant was capable of performing "some type of part-time totally sedentary work which would permit freedom for change of position as needed, proper seating, and will not require significant travel to and from the job."

In a treatment note of August 24, 1994, appellant's treating physician, Dr. Barbara G. Frieman, a Board-certified orthopedic surgeon, disagreed with Dr. Wieder about appellant's work capabilities stating that she did not envision any type of sedentary work for appellant, even on a part-time basis, that he would physically be able to perform. Dr. Friedman maintained that appellant is totally disabled from any gainful employment.

The Office referred appellant to Dr. Joseph A. Fabiani, a Board-certified orthopedic surgeon, to resolve the conflict in medical opinion. In a July 11, 1995 report, Dr. Fabiani stated that appellant's problems are all on a degenerative basis and diagnosed thoracic and lumbar

spondylosis. He further stated that the injury which appellant sustained at work certainly would not cause any of these changes. Dr. Fabiani opined, within a reasonable degree of medical certainty, that appellant's present and current conditions and complaints could not be attributed to the work injury as described on the statement of accepted facts. He further opined that although appellant was not capable of doing any work that requires any prolonged sitting or standing and could not work an eight-hour job, appellant is able to do shorter hours and evidently is able to do hand work such as hammering and other repairs.

By letter dated October 27, 1995, the Office advised appellant that they were proposing to terminate his benefits on the basis that the weight of the medical evidence established that there were no remaining residuals of his work-related injury. Appellant was afforded 30 days within which to submit additional evidence or argument.

Appellant submitted a November 10, 1995 statement essentially stating that all of the work he did for his entire tenure at the employing establishment gave rise to his present condition.

In a November 6, 1995 report, Dr. Frieman provided the results of her examination and reviewed the objective evidence taken since the accident of 1980. She stated that appellant remains totally disabled from any type of meaningful employment. Dr. Friedman stated that although appellant has severe degenerative disease of the lumbar spine and degenerative changes, the fact that he performed heavy labor for 14 years prior to his final injury and the fact that his degenerative changes have consistently worsened since his 1980 injury is all consistent with chronic repetitive stress injuries to the discs of the thoracic and lumbar spine which have ultimately lead to a severe enough spinal stenosis to cause neurologic impairment of appellant's left leg. She opined, within a reasonable degree of medical certainty, that she could not dismiss the 14-year history of heavy labor and repetitive stress to the lumbar and thoracic spine which appellant underwent as not being contributory to his final state of chronic spinal stenosis, degenerative disc disease and lumbar spondylosis. In summary, Dr. Friedman stated that appellant is totally disabled from any meaningful employment at this time and it was her belief, within a reasonable degree of medical certainty, that appellant had a cumulative repetitive stress injury to the thoracic and lumbar spine culminated by the final disc injury occurring November 3, 1980, which caused his acute severe worsening of his spondylosis and contributed to the spinal stenosis to the point where appellant was unable to continue working.

In a November 8, 1995 report, Dr. Mario J. Arena, a Board-certified orthopedic surgeon, provided a history of the injury as provided by appellant and his findings on examination. Dr. Arena additionally reviewed the objective evidence appellant brought with him. He indicated that appellant was suffering from multi-level spinal stenosis with radiculopathy and recommended that appellant undergo a surgical decompression. Dr. Arena stated that he believed appellant is 100 percent disabled from any meaningful gainful employment at this time on the basis of his spinal stenosis. Dr. Arena additionally stated that he believed that appellant's injury of November 3, 1980 was a significant causative factor with regard to appellant's current condition, therefore, his current disability is related to that injury.

By decision dated November 30, 1995, the Office terminated benefits effective December 10, 1995 on the basis of Dr. Fabiani's impartial medical report. The Office further

found that appellant's attempt to expand the scope of his claim from the 1980 traumatic incident to an occupational disease was not warranted at this point in time.

By decision dated December 11, 1996, an Office hearing representative found that the additional medical evidence received subsequent to Dr. Fabiani's report of July 11, 1995 was not sufficient to either shift the weight of the medical evidence or to warrant further development of the claim by the Office. Accordingly, the hearing representative affirmed the decision below.

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective December 10, 1995.

Where, as here, the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>1</sup> 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.<sup>2</sup>

In this case, Dr. Wieder, a second opinion physician, opined that appellant's work injury of November 3, 1980 and his occupational activities over an extended period of time aggravated his advanced degenerative spondylosis and spinal stenosis. Although Dr. Wieder did not render an opinion on whether the aggravation of appellant's condition by his work injury and occupational activities had ceased, he indicated that appellant was capable of performing some type of part-time totally sedentary work. In her August 24, 1994 report, Dr. Friedman, appellant's treating physician, opined that appellant was totally disabled from any gainful employment. The Office properly referred appellant to Dr. Fabiani for an impartial evaluation. He indicated that appellant's present and current conditions were not due to the November 3, 1980 work injury. Dr. Fabiani further opined that although appellant could not work an eight-hour day and had restrictions on sitting and standing, he could work short hours and is capable of doing hand work such as hammering and other repairs.

In situations when there exists 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 specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>3</sup>

The Board notes that the conflict in this case was created when Dr. Wieder opined that appellant was capable of working in a part-time totally sedentary environment while Dr. Friedman opined that appellant was totally disabled from any gainful employment. The Board finds that the weight of the medical evidence rests with the July 11, 1995 report of Dr. Fabiani, to whom the Office referred appellant, who determined that appellant was capable

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<sup>1</sup> *Harold S. McGough*, 36 ECAB 332 (1984).

<sup>2</sup> *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

<sup>3</sup> 5 U.S.C. § 8123(a); *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

of working short hours and is able to do hand work such as hammering and other repairs. His July 11, 1995 report is sufficiently rationalized and responsive to the Office's inquiries to be entitled to special weight. Dr. Fabiani was provided with a statement of accepted facts, the entire medical record with treatment notes and diagnostic findings, and performed his own examination of appellant. Based on his findings, he indicated that appellant's present and current conditions were not due to the November 3, 1980 work injury. Dr. Fabiani opined that although appellant could not work an eight-hour day and had restrictions on sitting and standing, he was able to perform for short hours and was capable of doing hand work such as hammering and other repairs. His report was based on accurate facts, thorough examination and all medical records and diagnostic results available. Dr. Fabiani's conclusion is supported by medical rationale and is fully responsive to the inquiries of the Office. Thus, the Board finds that the Office could properly rely on this aspect of his report, that appellant is capable of working, when it terminated appellant's compensation effective December 10, 1995.

Appellant subsequently submitted a November 6, 1995 report of Dr. Friedman and a November 8, 1995 report of Dr. Arena. Although Dr. Arena indicated that he believed appellant was 100 percent disabled from any meaningful gainful employment on the basis of his spinal stenosis, Dr. Arena did not provide a specific or fully rationalized opinion and, thus, his report is not sufficient to create a conflict in the medical evidence or to overcome the weight of the medical evidence as represented by the report of Dr. Fabiani.

In her November 6, 1995 report, Dr. Friedman indicated that appellant is totally disabled from any meaningful employment and that it was her belief, within a reasonable degree of medical certainty, that appellant had a cumulative repetitive stress injury to the thoracic and lumbar spine culminated by the final disc injury occurring November 3, 1980, which caused his acute severe worsening of his spondylosis and contributed to the spinal stenosis to the point where appellant was unable to continue working. The Board notes, however, that this report is substantially similar to Dr. Friedman's previously considered reports. The Board has held that reports submitted following issuance of a pretermination notice from the Office, which are similar to prior reports of record, are insufficient to overcome the weight accorded to the impartial medical specialist's report or to create a new conflict.<sup>4</sup> As such, Dr. Friedman's November 6, 1995 report is of insufficient weight to create a conflict in the medical evidence and to overcome the weight of the medical evidence concerning appellant's ability to work as represented by the report of Dr. Fabiani.

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<sup>4</sup> *Howard Y. Miyashiro*, 43 ECAB 1101 (1992); *Josephine L. Bass*, 43 ECAB 929 (1992); *Louis G. Psyras*, 39 ECAB 264 (1987).

The decision of the Office of Workers' Compensation Programs dated December 11, 1996 is hereby affirmed.

Dated, Washington, D.C.  
June 4, 1999

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member