

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CARMEN M. MELENDEZ and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, Brooklyn, NY

*Docket No. 98-1242; Submitted on the Record;
Issued November 15, 1999*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation benefits.

On November 19, 1990 appellant, then a 35-year-old clerk typist, sustained a lumbosacral sprain in the performance of duty.

By letter dated May 12, 1992, the Office advised appellant that she had been placed on the periodic compensation rolls effective January 29, 1992 to receive compensation benefits for temporary total disability.

In a report dated August 9, 1995, Dr. Raphael Cilento, appellant's attending neurosurgeon, provided a history of appellant's condition and diagnosed a cervical intervertebral disc lesion and resulting radiculopathy, a lumbosacral intervertebral disc lesion with sciatica, and internal derangement of the right shoulder as a result of the November 1990 employment injury. He also noted that a June 13, 1992 magnetic resonance imaging (MRI) scan and a computerized axial tomography (CAT) scan revealed multiple intervertebral disc lesions. Dr. Cilento stated that appellant also had arthritis of the lower back related to the employment injury. He stated his opinion that appellant was totally and permanently disabled since her 1990 employment injury.

In a report dated February 1, 1996, Dr. Jay A. Rosenblum, a neurologist and Office referral physician, provided a history of appellant's condition and course of medical treatment and provided findings on examination. He stated his opinion that appellant had a mild to moderate partial neurological disability and could perform part-time light duty.

By letter dated October 24, 1996, the Office referred appellant, along with a statement of accepted facts and copies of medical records, to Dr. Neil S. Rosenthal, a Board-certified neurologist and psychiatrist, in order to resolve the conflict in medical opinion between appellant's attending physician, Dr. Cilento, and Dr. Rosenblum, the Office referral physician.

In a report dated October 24, 1996, Dr. Rosenthal provided a history of appellant's condition, a summary of the medical records and test results and findings on examination. He stated:

“There was no tenderness over the cervical, thoracic or lumbosacral spine. There was no tenderness nor spasm in the paracervical, parathoracic nor paralumbar musculature. Mobility at the waist, including flexion, extension and tilting to the left and right, was full.... Straight leg raising tests and Patrick's signs were negative bilaterally. There was no tenderness to palpation over the sacroiliac joints nor over the sacroiliac notches. No tenderness to palpation over the coccyx.

“Mental status, speech and cranial nerves II-XII ... were normal. Motor exam[ination] revealed normal bulk, tone and power in all limbs. There were no adventitious movements. Coordinative testing was intact. Deep tendon reflexes were 2+ throughout and there were no Hoffman's or Babinski's signs. Sensory examination revealed normal pin, touch, vibration and position sense.... Her gait was variable. When she walked from my waiting room into my office, her gait was slow and tentative. However, she walked normally in my examination room and was also able to walk on her toes, heels and in tandem without difficulty. In addition, I observed her walking down the street when she left my office, and she was walking completely normally, *i.e.*, with normal sized and paced steps without any hesitation. When I asked her to bend over to try and touch her toes, she said she 'could not' do it because it would hurt her back, and then she bent forward minimally at the waist and grabbed her right lower back with her right hand and told me that she had 'pain' there. However, I observed her later on bending over to pick up her sneakers off the floor, and another time bending over to take her reading glasses out of her jacket pocket ... and she performed both of these maneuvers without any hesitation or complaint of pain.

“**IMPRESSION:** On neurological examination I could detect no objective findings in support of her complaints; there was no neurological impairment nor any positive mechanical signs on examination. Although she may initially have had some degree of lumbar and possibly cervical muscular strain and direct superficial soft tissue trauma as a result of her fall off the chair [on November 19, 1990], at this point in time I do not detect any objective evidence of neurological impairment of disability, nor see any need for further treatment or surgery. At this point in time there is no neurological contraindication to her returning to her former work position without any restrictions.”

By letter dated November 5, 1996, the Office advised appellant that it proposed to terminate her compensation benefits on the grounds that the weight of the medical evidence established that her employment injury had resolved with no continuing disability.

By decision dated December 10, 1996, the Office terminated appellant's compensation benefits on the grounds that the weight of the medical evidence, as represented by the report of

the impartial medical specialist, Dr. Rosenthal, established that appellant no longer had any disability or medical condition causally related to her November 19, 1990 employment injury.

By letter dated January 7, 1997, appellant requested a review of the written record by an Office hearing representative and submitted additional evidence.

By letter dated December 10, 1996, Dr. Cilento stated his opinion that neither Dr. Rosenblum nor Dr. Rosenthal was qualified to make a neurosurgical decision or statement regarding appellant. He also stated that the MRIs had been ignored and that they clearly showed pathology in the cervical and lumbosacral spine. He stated:

“On the basis of the documents surveyed and my evaluation as a Diplomate of the American Board of Forensic Examiners, a Diplomate of the American Board of Forensic Medicine as well as Chief of the American Academy of Neurological and Orthopedic Surgeons, it is my opinion that without any possible doubts these reports from Rosenthal and Rosenbloom [sic] should be discarded and not recognized.”

By decision dated April 23, 1997, the Office hearing representative affirmed the Office’s December 10, 1996 decision.

By letter dated September 29, 1997, appellant requested reconsideration of the Office’s decision to terminate her compensation benefits.

In a report dated June 23, 1997, Dr. Cilento diagnosed a cervical intervertebral disc lesion, cervical radiculopathy, cervicobrachial neuralgia, a lumbosacral intervertebral lesion, sciatica, and supervening spinal stenosis. He stated his opinion that appellant was totally and permanently disabled.

By decision dated December 11, 1997, the Office denied appellant’s request for further merit review of her claim.

The Board finds that the Office met its burden of proof in terminating appellant’s compensation benefits.

It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability had ceased or that it is no longer related to the employment.¹

In a report dated August 9, 1995, Dr. Cilento, appellant’s attending neurosurgeon, stated his opinion that appellant was totally and permanently disabled as a result of her 1990 employment injury. However, in a report dated February 1, 1996, Dr. Rosenblum, a neurologist,

¹ See *Alfonso G. Montoya*, 44 ECAB 193 (1992); *Gail D. Painton*, 41 ECAB 492 (1990).

and Office referral physician, stated his opinion that appellant had a mild to moderate partial neurological disability and could perform part-time light duty.

Section 8123(a) of the Federal Employees' Compensation Act provides, in pertinent part, "If there is 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."²

Due to the conflict in medical opinion between appellant's physician and the Office referral physician, the Office properly referred appellant, along with a statement of accepted facts and copies of medical records, to Dr. Rosenthal, a Board-certified neurologist and psychiatrist, for an independent examination and evaluation as to whether appellant had any residual disability or medical condition causally related to her employment injury.

In a report dated October 24, 1996, Dr. Rosenthal provided a history of appellant's condition, a summary of the medical records and test results and findings on examination.

The Board finds that the thorough and well-rationalized report of Dr. Rosenthal is entitled to special weight and establishes that appellant had no continuing disability or medical condition causally related to her 1990 employment injury.

By letter dated December 10, 1996, Dr. Cilento indicated his opinion that the reports from Drs. Rosenblum and Rosenthal should not be accepted as probative evidence in this case. He also stated that the MRIs had been ignored and that they clearly showed pathology in a cervical and lumbosacral spine. In a report dated June 23, 1997, Dr. Cilento stated his opinion that appellant was totally and permanently disabled. However, he did not provide a rationalized medical opinion explaining how appellant's claimed disability was causally related to her employment injury. Furthermore, as Dr. Cilento was on one side of the conflict of medical opinion which was referred to Dr. Rosenthal as the impartial medical specialist, Dr. Cilento's subsequent reports are insufficient to outweigh or create a new conflict with Dr. Rosenthal's opinion.³

² 5 U.S.C. § 8123(a).

³ See *Dorothy Sidwell*, 41 ECAB 857, 874 (1990).

The decisions of the Office of Workers' Compensation Programs dated December 11 and April 23, 1997 are affirmed.

Dated, Washington, D.C.
November 15, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member