

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BERNIDA F. WRIGHT and U.S. POSTAL SERVICE,
POST OFFICE, Houston, TX

*Docket No. 99-245; Submitted on the Record;
Issued October 22, 1999*

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 on September 18, 1998.

On July 12, 1995 appellant, then a 36-year-old letter carrier, filed a claim alleging that on July 10, 1995 she sustained pain in her lower back and muscle spasms in the center of her back, neck, shoulders and thighs when she lost her balance while pushing a hamper and fell on concrete. The Office accepted appellant's claim for a lumbar strain. Appellant stopped working on July 12, 1995 and did not return to work. The Office commenced payment of temporary total disability benefits.

Appellant subsequently worked for custom fabric upholstery, which was her husband's business. She was in nonemployment-related car accidents on November 18 and December 19, 1994 and July 4, 1995. From April 1997 to January 1998, the employing establishment conducted an investigation of appellant's activities and, while appellant was working for custom fabric upholstery, observed her moving furniture as in lifting, carrying, and placing the furniture on a truck and removing staples from the furniture which involved bending and twisting.

By decision dated February 26, 1996, the Office terminated appellant's compensation benefits effective March 3, 1996, finding that appellant refused to accept a suitable offer of employment. By letter dated March 4, 1996, appellant requested an oral hearing before an Office hearing representative. By decision dated January 22, 1997, the Office hearing representative vacated the Office's February 26, 1996 decision and reinstated appellant's compensation finding that appellant's treating physician, Dr. Ulysses W. Watkins, a family practitioner, changed his mind about appellant's inability to work, and therefore the Office's termination of benefits was not justified. The hearing representative also vacated a preliminary determination of overpayment issued by the Office on June 28, 1996. The hearing representative instructed the Office, on remand, to prepare a statement of accepted facts and refer appellant to a

Board-certified specialist for a physical examination and a rationalized medical opinion regarding the extent and nature of appellant's work-related disability.

In a report dated July 31, 1995, Dr. Taghi Shafie, a neurologist and appellant's treating physician, performed a physical examination and reviewed an electromyogram (EMG) which showed lumbar L5 nerve fiber irritation and a computerized axial tomography (CAT) scan which showed hypertrophic and inflammatory changes of the lumbar spine. In subsequent reports through July 21, 1997, Dr. Shafie found that appellant's neurological examination was unchanged and appellant was totally disabled. In a report dated June 19, 1997, Dr. Shafie stated that he was releasing appellant to return to work with restrictions and he would reevaluate her as required. In a report dated October 29, 1997, he noted that appellant's neurological examination showed paraspinal lumbar spine spasm and limitation of motion of the lumbar spine. In a report dated March 3, 1998, Dr. Shafie stated that appellant stated that she was ready to return to work as of the day after the evaluation. He stated that she should observe restrictions as far as lifting heavy objects. In a report dated March 4, 1998, Dr. Shafie stated that appellant could return to work on March 4, 1998 but should lift, carry, push or pull no more than 20 pounds.

In a report dated April 10, 1997, Dr. Keith S. Schauder, a Board-certified orthopedic surgeon and a second opinion physician, considered appellant's history of injury, performed a physical examination, reviewed the results of the EMG and reviewed x-rays which were normal. Dr. Schauder diagnosed a lumbar strain with sciatica but stated that he could not rule out a herniated disc. He recommended that a magnetic resonance imaging (MRI) scan be performed. In a report dated May 30, 1997, in response to questions from the Office, Dr. Schauder opined that appellant was partially disabled based on his past physical examination which showed that appellant had decreased range of motion of the lumbosacral spine in all planes and a decreased extensor hallucis longus strength on the right side. He stated that he found that appellant's condition was work related based on the historical data in that appellant had not been able to work since the July 10, 1995 employment injury and she had no other injuries to her back. Dr. Schauder also stated that appellant should be in a light-duty sedentary position with limited walking. He reiterated the need for an MRI scan. In a follow-up report dated June 12, 1997, Dr. Schauder performed a physical examination which showed that appellant had decreased strength in the extensor hallucis longus bilaterally. He noted that the MRI scan performed on appellant was negative and that he could find no evidence of disc herniation or spinal stenosis. Dr. Schauder stated he could find no objective evidence of appellant's pathology and diagnosed chronic lumbar pain syndrome. He recommended a referral to a pain clinic for epidural steroid injections to be followed by a work strengthening program and an assessment of an impairment rating.

In a report dated November 7, 1997, Dr. Julia L. Jones, a second opinion physician and a Board-certified psychiatrist and neurologist, considered appellant's history of injury, performed a physical examination, reviewed the EMG, nerve conduction studies and the MRI scan. Dr. Jones stated that appellant had a normal neurologic examination, had a history of mechanical low back pain and probably had some sacroiliac joint pain contributing. She also stated that symptoms that might identify with a fibromyalgia "type of picture" and inflammatory arthropathy in appellant's hands needed to be ruled out. Dr. Jones prescribed medicine, physical therapy and work hardening. In a note dated December 29, 1997, she noted that inspectors from

the employing establishment interviewed her in person and showed her pictures and a video tape of appellant performing various activities which appeared inconsistent with her disability. Dr. Jones stated that appellant had no limitation as far as work and might return as needed. In a report dated February 6, 1998, she noted that appellant's neurologic examination was unchanged and that appellant had status post lumbar sprain with a currently nonfocal neurological examination. Dr. Jones reiterated that appellant could return to work without restrictions.

In a report dated May 6, 1998, Dr. Jeffery J. Tucker, a Board-certified orthopedic surgeon and a second opinion physician, considered appellant's history of injury, performed a physical examination and considered the results of the EMGs, one performed on July 25, 1995 and the other performed on July 30, 1997, which showed bilateral L5 nerve root irritation, and the results of a CAT scan performed on July 27, 1995 and the MRI scan which were normal. Dr. Tucker diagnosed probable low back strain, by history resolved, and objective evidence of ongoing lumbar strain. He stated appellant's neurological examination was normal. Dr. Tucker stated that he did not think that appellant's previous accidents in 1994 and 1995 (apparently referring to the car accidents) affected her condition. He noted the presence of significant abnormal pain behavior and symptom magnification during his examination and that the employing establishment had filmed appellant moving heavy furniture. Dr. Tucker stated that based on this evidence, the possibility of malingering by appellant "must be entertained." He stated that appellant's lifting the heavy furniture was inconsistent with an ongoing lumbar strain and the EMG results showing the bilateral L5 nerve root irritation should be disregarded. Dr. Tucker also noted that the CAT scan of the lumbar spine in July 1995 and the MRI scan in May 1997 were normal. He opined that appellant had recovered from her July 10, 1995 employment injury and could perform her usual work.

In a report dated May 7, 1998, Dr. Donna M. Schramm, a Board-certified physiatrist, stated that x-rays were abnormal and suggested a diagnosis of bone problems.

By decision dated September 18, 1998, the Office terminated appellant's compensation benefits, stating that the evidence of record, particularly the opinion of Dr. Tucker, established that appellant had no continuing disability or medical condition as a result of the July 10, 1995 employment injury.

The Board finds that the Office met its burden of proof to terminate compensation benefits.

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits. 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.¹ The Office's burden of proof includes the necessity of furnishing rationalized medical evidence based on a proper factual and medical background.²

¹ *Wallace B. Page*, 46 ECAB 227, 229-30 (1994); *Jason C. Armstrong*, 40 ECAB 907, 916 (1989).

² *Larry Warner*, 43 ECAB 1027, 1032 (1992); *see Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

In the present case, the weight of the evidence lies with the second opinion physician, Dr. Tucker. In his May 6, 1998 report, Dr. Tucker opined that appellant's low back strain had resolved and her neurological examination was normal. He stated that appellant had objective evidence of ongoing lumbar strain, apparently referring to the EMG results showing L5 nerve root irritation, but stated that appellant's activity of lifting heavy furniture was inconsistent with an ongoing lumbar strain and the EMG results should be disregarded. Dr. Tucker noted that the CAT scan of the lumbar spine in July 1995 and the MRI scan in May 1997 were normal. He concluded that appellant had recovered from her injuries resulting from the July 10, 1995 employment injury and that appellant could return to work without restrictions. Dr. Tucker's opinion is well rationalized and establishes that appellant had recovered from the July 10, 1995 employment injury. His opinion is corroborated by the most recent opinion of Dr. Schauder, also a second opinion physician, dated June 12, 1997, that the MRI scan was negative and he could find no objective evidence of appellant's pathology. The second opinion of Dr. Jones dated November 7 and December 7, 1997 and February 6, 1998 in which she stated that appellant's neurological examination was normal, that appellant's video taped activities were inconsistent with her disability, and appellant could return to work without restriction also corroborates Dr. Tucker's opinion. The opinion of Dr. Shafie, appellant's treating physician, dated from June 19, 1997 through March 4, 1998, in which he stated that appellant's neurological examination showed paraspinal lumbar spine spasm and limitation of motion of the lumbar spine and returned appellant to work with lifting, carrying, pushing and pulling restrictions is not well rationalized as he did not provide a sufficient explanation for appellant's ongoing disability and did not reconcile the video film of appellant's performing strenuous activity with her subjective complaints and his objective findings.³ Dr. Schramm's May 7, 1998 opinion in which she stated that the x-rays were abnormal and suggested bone problems is not probative as she did not provide a rationalized opinion for her diagnosis nor did she address appellant's ability to work.⁴ Inasmuch as Dr. Tucker's opinion is well rationalized and establishes that appellant could return to work without restrictions, and is corroborated by Drs. Schauder and Jones' opinions, it constitutes the weight of the evidence and justifies the Office's termination of benefits.

³ See *Larry Warner*, *supra* note 2 at 1032.

⁴ *Id.*

The decision of the Office of Workers' Compensation Programs dated September 18, 1998 is hereby affirmed.

Dated, Washington, D.C.
October 22, 1999

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member