

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROL ANNE O'CONNELL and U.S. POSTAL SERVICE,
WEST SIDE STATION, Worcester, MA

*Docket No. 97-2285; Submitted on the Record;
Issued September 2, 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 to terminate appellant's compensation benefits on the grounds that she had no continuing disability resulting from the accepted work injury.

The Board has carefully reviewed the record evidence and finds that the Office failed to meet its burden of proof in terminating appellant's compensation.

Under the Federal Employees' Compensation Act,¹ once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of compensation.² Thus, after the Office determines that an employee has disability causally related to his or her employment, the Office may not terminate compensation without establishing either that its original determination was erroneous or that the disability has ceased or is no longer related to the employment injury.³

In the present case, appellant's notice of traumatic injury, filed on July 29, 1988, was accepted by the Office for sprains of the back and right ankle, knee and wrist after a large dog jumped on appellant as she was delivering mail, forcing her to fall backward into a hole in the yard. Appellant stopped work and did not return.⁴ The Office, on July 29, 1996, terminated appellant's compensation, effective August 18, 1996, on the grounds that she had no continuing disability resulting from the accepted work injury.

¹ 5 U.S.C. §§ 8101-8193.

² *William Kandel*, 43 ECAB 1011, 1020 (1992).

³ *Carl D. Johnson*, 46 ECAB 804, 809 (1995).

⁴ Appellant received \$280,000.00 in a settlement against a third party following the dog's attack.

Appellant requested a hearing before an Office hearing representative which was held on February 13, 1997. On April 14, 1997 the hearing representative affirmed the Office's July 29, 1996 termination of appellant's compensation, on the grounds that Dr. Walter D. Carver, a Board-certified orthopedic surgeon and the Office's second opinion physician's, opinion represented the weight of the medical opinion evidence, but remanded the case for further evidentiary development of reports from Dr. Donald Stevens, a Board-certified anesthesiologist, and noted that his opinion conflicted with that of Dr. Carver.

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits on July 29, 1996 because a conflict in the medical opinion evidence existed between Dr. Carver and Dr. Farajallah Habib, an anesthesiologist who was appellant's primary treating physician since May 1989, at the time the Office terminated appellant's compensation benefits as to whether appellant remained disabled due to the employment injury.

Dr. Carver concluded in his June 20, 1995 report that appellant exhibited no significant impairment or disability based on a lack of objective clinical findings to support her "constant low-back distress." He added that any impairment was "essentially subjective" and no specific "clear and convincing" objective symptoms would prevent appellant from carrying out her work as a letter carrier. Dr. Carver completed a disability form on June 30, 1995 indicating that appellant could work eight hours a day and had "no objective limitations." He added that appellant's current medical condition would be essentially the same today with or without the July 29, 1988 incident.

By contrast, Dr. Habib had since that time diagnosed appellant's condition causally related to the accepted injury as mechanical and radicular low back pain, with facet joint disease. In a narrative report to the Office dated April 5, 1990, he explained that this diagnosis was confirmed by a diagnostic facet block. Dr. Habib had requested authorization from the Office for facet block injections to treat this condition and the Office granted authorization for such treatment. Appellant submitted the reports of her numerous facet joint injections administered by Dr. Habib. In a response to the Office's request for an updated medical report, he stated in a June 21, 1996 report that appellant's chronic low back pain was related to the 1988 fall, that she continued to suffer from severe mechanical and radicular low back pain with facet joint disease and that she was permanently totally disabled due to her work injury.

Section 8123 of the Act⁵ provides that if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination to resolve the conflict.⁶ The Board has interpreted the statute to require more than a simple disagreement between two physicians. To constitute a true conflict of medical opinion, the opposing physicians' reports must be of virtually equal weight and rationale.⁷

⁵ 5 U.S.C. § 8123(a).

⁶ *Shirley L. Steib*, 46 ECAB 309, 316 (1994); see *Dallas E. Mopps*, 44 ECAB 454, 456 (1993).

⁷ *Adrienne L. Wintrip*, 38 ECAB 373, 379 (1987).

The Board finds that at the time the Office terminated appellant's compensation benefits, July 29, 1996, a conflict existed in the medical opinion evidence as to whether appellant remained disabled due to residuals of the employment injury. As the Office did not resolve this conflict in the medical opinion evidence, the Office did not meet its burden of proof to terminate appellant's compensation benefits.

Finally, the Board notes that after the Office terminated appellant's compensation benefits, the Office received additional reports from appellant's treating physicians in support of her claim. Dr. Stevens, who began treating appellant after Dr. Habib left the pain management center, concurred in Dr. Habib's diagnosis of lumbar myofascial pain syndrome as well as facet joint disease causally related to appellant's back injury in 1988. In a February 6, 1997 report, Dr. Stevens disagreed with Dr. Carver regarding the lack of objective findings because he failed to mention the abnormalities related to appellant's facet joint disease, first diagnosed by Dr. Felix Heimberg, a Board-certified orthopedic surgeon. Dr. Stevens stated that a hyperextension injury is one where the force of the impact is absorbed by the lumbar facet joints. Dr. Stevens added that the early x-rays demonstrated facet joint problems, that appellant's pain syndrome was more than simply subjective or psychological in nature and that Dr. Carver failed to palpate appellant's low back, thereby missing the trigger points that produced pain down her right leg.

Finally, Dr. Charles P. Sweet, Board-certified in internal medicine, who evaluated appellant for disability upon referral by Dr. Stevens, stated in a February 11, 1997 report that appellant's functional capacity was "very limited," with a few hours a day of light activity and that her impairment appeared to be permanent. He added that her symptoms and his findings were "chronic degenerative lumbosacral disc and facet disease with right S1 nerve root injury."

As there was an unresolved conflict of opinion at the time the Office terminated appellant's compensation benefits between appellant's long term treating physician, Dr. Habib, and Dr. Carver, as to whether appellant had residuals of the employment injury which continued to disable her, the Office did not meet its burden of proof in this case.

The April 14, 1997 and July 29, 1996 decisions of the Office of Workers' Compensation Programs are reversed.

Dated, Washington, D.C.
September 2, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member