

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KATHLEEN M. WEIR and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Duxbury, MA

Docket No. 98-2075; Oral Argument Held June 15, 1999;
Issued September 21, 1999

Appearances: *John L. Whitehouse, Esq.*, for appellant; *Sheldon G. Turley, Jr., Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective August 21, 1996.

On December 17, 1984 appellant, then a 42-year-old letter carrier, was lifting newspapers out of bins when she developed back pain. She stopped working on December 19, 1984 and returned to work on January 9, 1985. The Office accepted her claim for low back strain. Appellant received continuation of pay for the period December 20, 1984 through January 8, 1985. On October 10, 1985 appellant was putting bundles of mail in a bin when she again developed back pain. She returned to work on December 18, 1985. The Office accepted appellant's claim for lumbar strain. She received continuation of pay for the period October 15 through November 28, 1985, used sick leave from December 2 to December 6, 1985 and was on leave without pay from December 9 through December 17, 1985. She returned to work for two to four hours a day on light duty. The Office accepted appellant's claim and paid compensation for the hours she did not work through July 13, 1987. In a May 22, 1987 letter, the employing establishment offered appellant a position as a modified distribution clerk. Appellant accepted the position and returned to work on June 6, 1987 but did not work eight hours a day. She sought compensation for the hours she did not work. In a June 22, 1988 decision, the Office denied appellant's claim on the grounds that she had not met her burden of proof. On December 28, 1988 appellant stopped working and filed a claim for a recurrence of disability. In a June 16, 1989 decision, the Office denied appellant's claim for a recurrence of disability. Appellant returned to work on September 12, 1989.

On December 4, 1992 appellant was bent over and twisting while boxing mail when she developed sharp pain in her back. She stopped working on December 5, 1992. In a February 16, 1993 decision, the Office rejected appellant's claim on the grounds that fact of an injury had not been established. In a March 21, 1994 decision, an Office hearing representative affirmed the Office's February 16, 1993 decision. In an August 3, 1994 decision, the Office vacated its

February 16, 1993 decision and found that appellant had submitted sufficient evidence to establish that she had sustained an injury in the performance of duty. The Office accepted appellant's claim for low back strain and paid compensation retroactive to December 5, 1992.

In a July 30, 1996 decision, the Office terminated appellant's compensation effective that date on the grounds that the evidence of record failed to demonstrate that appellant's continuing compensation was causally related to her employment injury. In an August 21, 1996 decision, the Office reissued its decision terminating appellant's compensation to reflect that it had received additional medical evidence from appellant but had not changed its conclusion that appellant's continuing disability was no longer causally related to the employment injury. Appellant requested a hearing before an Office hearing representative. In a May 14, 1998 decision, the Office hearing representative found that the Office had met its burden of proof in terminating appellant's compensation. He further found, however, that appellant had submitted additional medical evidence after the Office's termination of appellant's compensation which had created a new conflict in the medical evidence. He therefore remanded the case for referral of appellant to an appropriate impartial specialist for an examination and opinion on whether appellant's disability was causally related to her employment injury. On June 17, 1998 appellant's appeal was docketed with the Board. In an August 11, 1998 decision, the Office suspended appellant's right to compensation on the grounds that she had failed to appear for an examination by a physician selected by the Office as an impartial medical specialist.

The Board finds that the Office improperly terminated appellant's compensation.

Once the Office accepts 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 based its decision to terminate appellant's compensation on the March 29, 1996 report from a panel consisting of Dr. Hyman Glick, a Board-certified orthopedic surgeon, and Dr. J. Peter Strang, a psychiatrist. In the orthopedic evaluation, Dr. Glick reviewed a January 1993 magnetic resonance imaging (MRI) scan which he interpreted as showing a lateral, left-sided, L4-5 disc protrusion at the level of the neural foramen, not encroaching on the L5 nerve root. He concluded that appellant had chronic pain behavior and chronic pain syndrome superimposed on incompletely symptomatically resolved low back sprains. Dr. Glick stated that appellant did not sustain a herniated disc on December 4, 1992 because she did not have left-sided leg pain when she was first examined after that employment injury. He indicated that there were no objective signs of ongoing nerve irritation. Dr. Glick commented that he did not feel that the L4-5 noted on the January 1993 MRI scan was responsible for appellant's current symptoms. He concluded that appellant's current disability was not due to a residual of the December 4, 1992 employment injury. Dr. Glick stated that appellant had a low back sprain and indicated that the disability associated with that injury probably ended by July 1, 1993 "based upon consideration of specific case information and the known natural history." He commented that if appellant had not developed chronic pain syndrome and major depression, she would have returned to her preinjury status which involved limited duty and work restrictions. Dr. Glick,

¹ *Jason C. Armstrong*, 40 ECAB 907 (1989).

however, in concluding that appellant's disability ended by July 1, 1993 based on his consideration of the case and known natural history, gave a general, incomplete rationale in support of his opinion. He did not specify the considerations in appellant's case or the precise natural history on which he based his conclusion. Dr. Glick's report therefore has little probative value because his conclusion is unsupported by the detailed rationale necessary to support his conclusion.

When notified of the proposed termination of compensation, appellant submitted a July 15, 1996 report by Dr. Douglas G. Bentley, a Board-certified orthopedic surgeon, who diagnosed a herniated L4-5 lumbar disc on the left directly related to the December 4, 1992 employment injury, chronic pain syndrome secondary to herniated lumbar disc and chronic depression related to the herniated disc and chronic pain syndrome. Dr. Bentley pointed out that appellant had multiple back injuries but the computerized tomography (CT) scans had been negative for lumbar disc pathology. He indicated that the December 4, 1992 employment injury was followed by a dramatic increase in left leg pain, lower back pain, numbness and weakness. Dr. Bentley stated that the January 1993 MRI scan clearly and unequivocally showed a herniated L4-5 disc on the left side which had not been present on previous CT scans. He concluded that the herniated disc, therefore, was casually related to the December 4, 1992 employment injury. Dr. Bentley stated that appellant, in his examination, clearly and consistently demonstrated subjective and positive objective physical findings completely consistent with a herniated L4-5 disc on the left side. He concluded that appellant remained disabled for work and recommended further testing. In a December 12, 1997 report, Dr. Bentley gave a more detailed history of appellant's employment injury and subsequent treatment. He repeated the diagnoses he had given previously. Dr. Bentley indicated that appellant, after five days of unremitting pain after the December 4, 1992 employment injury, was examined at a hospital emergency room and showed classic symptoms of disc involvement which was noted by the examining physician. He repeated his analysis that the January 1993 MRI scan showed a herniated disc while CT scans taken prior to the December 4, 1992 employment injury had not shown a herniated disc. Dr. Bentley therefore concluded that all the medical evidence surrounding the employment injury was consistent with a diagnosis of a herniated disc related to the employment injury.

Dr. Bentley's conclusion that the December 4, 1992 employment injury caused a herniated L4-5 disc directly contradicts the report of Dr. Glick who stated that there was no herniated disc. He stated that objective and subjective symptoms supported the diagnosis while Dr. Glick found no objective symptoms. Dr. Bentley submitted substantial rationale in support of his opinion in pointing out that there was no evidence of a herniated disc on CT scans taken prior to the December 4, 1992 employment injury but there was such evidence on the MRI scan taken within two months of that injury. Drs. Bentley and Glick therefore disagreed on the findings on examination, on the interpretation of the January 1993 MRI scan, on the diagnosis of appellant's condition and on the issue of whether her condition was related to the employment injury. Dr. Bentley's July 15, 1996 report contained the MRI interpretation, examination findings, diagnosis and rationalized opinion on the issue of causal relationship. Therefore it was this report that caused the conflict in the medical evidence. His December 12, 1997 report only repeated and amplified his prior conclusions and rationale on the issue of causal relationship. The Office hearing representative therefore erred in finding that the conflict in the medical evidence arose only after the Office had met its burden of proof in terminating appellant's compensation. The conflict in the medical evidence occurred before the Office issued its decision to terminate appellant's compensation. Therefore, since the conflict in the medical

evidence was created before the Office issued its decision to terminate compensation, the Office did not meet its burden of proof in terminating appellant's compensation.

The Board notes that pursuant to the Office hearing representative's decision, the Office referred appellant to an impartial medical specialist to resolve the issue of whether appellant had any disability causally related to the December 4, 1992 employment injury. In an August 11, 1998 decision, the Office suspended appellant's right to compensation for failure to appear for that examination. However, appellant's appeal was docketed with the Board on June 17, 1998. The issue before the Office which resulted in suspending appellant's compensation arises from the same issue that is before the Board. As noted above, the Office hearing representative erred in finding that the conflict in medical opinion did not arise until after the Office had terminated appellant's compensation, thus placing the burden of proof on appellant. The Board finds this was error. The Office's August 11, 1998 decision is null and void as it is premised on the May 14, 1998 decision which is reversed.²

The decision of the Office of Workers' Compensation Programs, dated May 14, 1998, is hereby reversed and the case is returned to the Office for reinstatement of compensation benefits effective August 21, 1996.

Dated, Washington, D.C.
September 21, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

² See *Douglas E. Billings*, 41 ECAB 880 (1990).