

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SONIA M. ALMODOVAR and U.S. POSTAL SERVICE,
POST OFFICE, New York, NY

*Docket No. 00-200; Submitted on the Record;
Issued August 9, 2000*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs has met its burden of proof to justify termination of appellant's benefits effective January 6, 1998.

On November 27, 1996 appellant, then a 48-year-old window distribution clerk, fell on wet paint on a floor which caused her to sustain injuries to her left ankle and back. She stopped work on November 28, 1996 and has not returned. The Office accepted the claim for a lumbosacral and left ankle sprain. Appellant was paid appropriate compensation.

Accompanying her claim, appellant submitted a treatment note from Dr. Danuta Janiszewski, a Board-certified orthopedic surgeon, dated December 3, 1996. He indicated a diagnosis of strain to the low back, ribs and ankle with a note that appellant would not be able to return to work for one month.

Thereafter, appellant submitted various medical records from Dr. Janiszewski noting that her employment injury remained disabling. Reports from him diagnosed a strain to the back and left ankle.

In a report dated April 15, 1997, Dr. Janiszewski noted appellant had been unable to work due to her employment injury. He noted that appellant had pain and tenderness around L4-5, S1 with limitation in bending due to spasm and pain. Straight leg raising was positive at 60 to 65 degrees on the left. Left ankle puffiness has improved but had not resolved. Dr. Janiszewski stated that appellant had undergone several tests indicating a dysfunction of the nerve and a right L5 dysfunction. He also noted objective findings based on an electromyogram of low back radiculopathy with radiation to the legs. Dr. Janiszewski diagnosed radiculopathy and discopathy post traumatic in the low back. He provided the opinion that appellant is totally and permanently disabled. Dr. Janiszewski and his associates continued submitting form reports and disability certificates indicating that appellant remained disabled due to her employment injury.

The employing establishment submitted several reports from Dr. Irene Chow, an osteopath and a fitness-for-duty physician, indicating that appellant could return to work.¹

On November 19, 1997 the Office referred appellant for a second opinion examination to Dr. Nate Bondi, a Board-certified orthopedic surgeon. The Office provided him with appellant's medical records, a statement of accepted facts as well as a detailed description of appellant's employment duties.

In a medical report dated November 19, 1997, Dr. Bondi indicated that he reviewed the records provided to him and performed a physical examination of appellant. He noted that appellant stated that she had an injury to her lumbosacral spine in 1994. Dr. Bondi reviewed the nerve conduction studies and noted that they showed normal distal latencies and conduction velocities, with the F and H waves and reflexes within normal limits. He opined that there were no objective findings related to appellant's complaint of lumbosacral and left ankle pain. Dr. Bondi determined as of November 19, 1997 that appellant was fully recovered from the injury of November 27, 1996 and that there was no medical evidence that appellant was disabled. He further stated that appellant had no objective findings hindering her recovery or return to duty and that no further medical treatment was necessary.

On December 5, 1997 the Office issued a notice of proposed termination of compensation on the grounds that Dr. Bondi's November 19, 1997 report established no continuing disability as a result of the November 27, 1996 employment injury. The Office provided 30 days in which appellant could respond to this notice.

By decision dated January 6, 1998, the Office terminated appellant's benefits effective January 6, 1998 on the grounds that the weight of the medical evidence established that appellant had no continuing disability resulting from her November 27, 1996 employment injury.

By letter dated December 3, 1998, appellant's attorney requested reconsideration of the January 6, 1998 decision of the Office. Appellant submitted additional medical evidence.

In a January 19, 1998 report, Dr. Janiszewski diagnosed appellant with low back strain with radiculopathy and strain with ganglion to the left ankle. He stated appellant's symptoms and injuries were directly connected to her accident. Dr. Janiszewski concluded that appellant was permanently disabled due to the post-traumatic low back strain with radiculopathy.

By merit decision dated August 26 1999, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was not sufficient to warrant modification of its prior decision.

The Board finds that the Office has not met its burden of proof to terminate benefits effective January 6, 1998.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.² After it has determined that an employee has disability

¹ There are also documents of record referencing injuries that appellant had in 1991 and 1994.

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.³

In this case, the Office accepted that appellant sustained a lumbosacral and left ankle sprain on November 27, 1996 and paid appropriate compensation thereafter. The Office terminated appellant's compensation effective January 6, 1998 based on Dr. Bondi's examination and report. The Board finds that there is a conflict in medical opinion between Dr. Bondi, the Office referral physician and Dr. Janiszewski, appellant's treating physician, both of whom are Board-certified specialist in their respective fields.

Dr. Bondi opined that there was no objective basis for appellant's complaints and that she could return to work. He indicated that appellant was fully recovered from her employment-related injury and was capable of returning to her preinjury employment. By contrast, Dr. Janiszewski diagnosed appellant with radiculopathy and discopathy post traumatic in the low back and continually concluded that appellant was totally and permanently disabled. Dr. Janiszewski has consistently supported permanent work-related disability related to appellant's back condition, while Dr. Bondi found that appellant has no work-related residuals of the accepted injury and that she is capable of resuming her preinjury employment.

Section 8123 of the Federal Employees' Compensation Act⁴ provides that if there is a disagreement between the physician making for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination.⁵ The Board finds that because the Office relied on Dr. Bondi's opinion to terminate appellant's compensation without having resolved the existing conflict, the Office has failed to meet its burden of proof in terminating compensation on the grounds that disability had ceased.⁶

² *Harold S. McGough*, 36 ECAB 332 (1984).

³ *Vivian L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

⁴ 5 U.S.C. § 8123(a).

⁵ *Shirley L. Steib*, 46 ECAB 309 (1994).

⁶ See *Craig M. Crenshaw, Jr.*, 40 ECAB 919, 923 (1989) (finding that the Office failed to meet its burden of proof because a conflict in the medical evidence was unresolved).

The decisions of the Office of Workers' Compensation Programs dated August 26, 1999 and January 6, 1998 are hereby reversed.

Dated, Washington, D.C.
August 9, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member