

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JEAN SMIROLDO and DEPARTMENT OF VETERANS AFFAIRS,
MEDICAL CENTER, Northport, NY

*Docket No. 97-2876; Submitted on the Record;
Issued March 14, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation benefits as of November 12, 1995 on the basis that the residual effects of her work-related injury of August 9, 1987 had ceased; and (2) whether appellant has established an employment-related disability on or after November 12, 1995.

On August 9, 1987 appellant, then a 57-year-old nursing assistant, filed a notice of traumatic injury and claim for compensation (Form CA-1) alleging that earlier that day she heard a "pop" in her back when she attempted to move a patient. Appellant ceased work on the day of her injury. The Office accepted appellant's claim for low back strain and herniated disc at L4-5 and she was placed on the periodic compensation rolls. Appellant did not return to work after her August 9, 1987 injury and she received disability compensation for approximately eight years following her work-related injury.

By decision dated October 25, 1995, the Office terminated appellant's compensation benefits effective November 12, 1995 on the grounds that the medical evidence of record established that the residual effects of her work-related injury of August 9, 1987 had ceased. The Office based its decision on the August 21, 1995 opinion of Dr. Edward P. Ryan, a Board-certified neurosurgeon and an impartial medical examiner.¹ Dr. Ryan found that appellant did not have any neurological disability related to her August 9, 1987 employment injury. He further indicated that appellant's neurological abnormalities were far more consistent with a diabetic peripheral neuropathy than with any type of disc herniation.

¹ In August 1995 the Office referred appellant to Dr. Ryan for examination in order to resolve a conflict in the medical opinion evidence between appellant's treating physician, Dr. Dominick Basile, a Board-certified internist and Dr. William H. Bloom, a Board-certified neurosurgeon and an Office referral physician. Whereas Dr. Basile diagnosed herniated nucleus pulposus and expressed the opinion that appellant was disabled as a result Dr. Bloom in a report dated July 6, 1993, noted findings consistent with a peripheral neuropathy rather than a herniated disc and he concluded that appellant's current disability was unrelated to her August 9, 1987 employment injury. Dr. Bloom raised the question of whether appellant's current condition was secondary to her history of diabetes mellitus.

On February 2, 1996 appellant requested reconsideration and she submitted additional medical evidence. After reviewing appellant's claim on the merits, the Office denied modification by decision dated April 25, 1996. The Office found that notwithstanding appellant's newly submitted evidence, the impartial medical examiner's August 21, 1995 opinion continued to represent the weight of the medical evidence of record. Accordingly, the Office affirmed the October 25, 1995 decision terminating benefits.

Appellant filed a second request for reconsideration on April 11, 1997. Her request was accompanied by an August 5, 1996 report from Dr. Frederic A. Mendelsohn, a Board-certified neurologist, who found that appellant suffered from sciatica, secondary to her August 9, 1987 employment injury and not diabetic peripheral neuropathy. Additionally, appellant submitted a June 21, 1996 report from another Board-certified neurologist, Dr. Patrick E. Poole, who concluded that appellant had multiple disc herniations in her low back with lumbar radiculopathy, attributable to her August 9, 1987 employment injury. Dr. Poole further noted that while appellant had an associated diabetic neuropathy, this condition was not the basis of all her complaints.

The Office subsequently referred the reports of Drs. Poole and Mendelsohn to its district medical adviser for review. In a report dated June 27, 1997, the district medical adviser noted that there was a basic contradiction between the physical examinations of Drs. Poole and Mendelsohn as compared to those reported by Drs. Ryan and Bloom. He concluded that he was unable to determine, which examinations were correct.

In a merit decision dated July 25, 1997, the Office again denied modification of the prior decision terminating benefits. The Office explained that in light of the contradictions among the various physical examinations as noted by the district medical adviser, the weight of the medical evidence remained with Dr. Ryan's August 21, 1995 independent medical evaluation.

The Board finds that the Office met its burden of proof in terminating appellant's compensation benefits as of November 12, 1995.

Once the Office has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.² Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.³

In the instant case, the Office determined that a conflict of medical opinion existed based on the opinions of Drs. Bloom and Basile. Therefore, the Office properly referred appellant to Dr. Ryan to serve as an impartial medical examiner. He concluded that appellant no longer had any continuing disability related to her August 9, 1987 employment injury.⁴ The Board finds

² *Curtis Hall*, 45 ECAB 316 (1994); *John E. Lemker*, 45 ECAB 258 (1993); *Robert C. Fay*, 39 ECAB 163 (1987).

³ *Jason C. Armstrong*, 40 ECAB 907 (1989).

⁴ The Federal Employees' Compensation Act 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

that the Office properly relied on the impartial medical examiner's August 21, 1995 report as a basis for terminating benefits effective November 12, 1995. Dr. Ryan concluded that appellant did not have any neurological disability related to her August 9, 1987 employment injury and that her current neurological abnormalities were far more consistent with a diabetic peripheral neuropathy than with any type of disc herniation. The impartial medical examiner's report is sufficiently well rationalized and based upon a proper factual background. Dr. Ryan provided findings on examination of appellant and reviewed appellant's medical records. He also reported accurate medical and employment histories. Accordingly, the Office properly accorded determinative weight to Dr. Ryan's opinion.⁵ Inasmuch as Dr. Ryan concluded that appellant did not have any neurological disability related to her August 9, 1987 employment injury, the Office properly relied on his opinion as a basis for terminating appellant's compensation benefits effective November 12, 1995.

With respect to the issue of whether appellant has established an employment-related disability on or after November 12, 1995, the Board has duly reviewed the case record on appeal and finds that the case is not in posture for a decision.

After it has been established that termination or modification of benefits is clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that she had an employment-related disability that continued after termination of compensation benefits.⁶ Accordingly, the issue presented is whether appellant has met her burden of proof in establishing an employment-related condition on or after November 12, 1995 and if so, whether she has established any periods of disability causally related to an employment injury.

In the instant case, the Board finds a conflict in the medical evidence is created between the opinions of Dr. Mendelsohn and Dr. Ryan. As previously noted, Dr. Ryan found that appellant did not have any neurological disability related to her August 9, 1987 employment injury and that her current neurological abnormalities were far more consistent with a diabetic peripheral neuropathy than with any type of disc herniation. He further commented that appellant's November 23, 1987 electrodiagnostic studies were inconclusive. Both Drs. Poole and Mendelsohn disagreed with Dr. Ryan's opinion that appellant's current condition was wholly attributable to diabetic peripheral neuropathy. Specifically, Dr. Mendelsohn found no clinical evidence of diabetic neuropathy. He explained that diabetic peripheral neuropathy results in absent ankle reflexes bilaterally, but in appellant's case she had good ankle reflexes in the asymptomatic leg. Dr. Mendelsohn also commented that appellant's sensory nerve action potentials were normal, which was inconsistent with a diagnosis of diabetic peripheral

make an examination. 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

⁵ In cases where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight. *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

⁶ *Talmadge Miller*, 47 ECAB 673, 679 (1996).

neuropathy. Additionally, he noted that appellant's diagnostic studies were consistent with radiculopathy and not diabetic neuropathy.

The Office medical adviser commented on certain contradictions among the findings on physical examination reported by appellant's neurologists and the findings reported by Dr. Ryan, the impartial medical examiner. Notwithstanding the fact that the district medical adviser indicated he could not determine which physical examinations were correct, the Office accorded determinative weight to Dr. Ryan's findings over the findings of Drs. Poole and Mendelsohn. The district medical adviser noted, however, that Dr. Mendelsohn made a "convincing case for radiculopathy."

In light of the conflict created between the medical opinions of Drs. Mendelsohn and Ryan, the Office should refer the claim to a new impartial specialist for resolution of the issue in accordance with section 8123(a) of the Act.⁷ Accordingly, the case will be remanded to the Office for referral of appellant, the case record and a statement of accepted facts to an appropriate impartial specialist. After such further development of the record as the Office deems necessary, the Office shall issue a *de novo* decision.

The July 25, 1997 decision of the Office of Workers' Compensation Programs is, hereby, set aside and the case is remanded for further consideration consistent with this opinion.

Dated, Washington, D.C.
March 14, 2000

George E. Rivers
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

⁷ 5 U.S.C. § 8123(a); *e.g.*, *William C. Bush*, 40 ECAB 1064 (1989).