

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of STEPHANIE M. GILLIAM and U.S. POSTAL SERVICE,  
POST OFFICE, Philadelphia, PA

*Docket No. 99-1814; Submitted on the Record;  
Issued March 27, 2000*

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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 benefits effective May 14, 1998.

On January 3, 1996 appellant, then a 33-year-old carrier technician, filed a notice of occupational disease and claim for compensation, alleging that she developed a back condition in the performance of duty. The Office accepted the claim for lumbosacral strain, cervical strain with bulging disc and aggravation of a herniated disc at L5-S1.<sup>1</sup> She stopped work on June 12, 1995 when she experienced lower back pain and a tingling sensation in her legs.

In order to facilitate a return to work, the Office assigned appellant to a rehabilitation specialist. Appellant was examined by Dr. Mark P. Brigham, a Board-certified orthopedic surgeon, on May 15, 1996. He recommended that appellant undergo aquatic therapy and opined that she could return to sedentary work for eight hours per day. Dr. Brigham noted, however, that appellant was pregnant and that her condition would impede improvement of her back.

Appellant's treating physician, Dr. Mark D. Avart, a Board-certified orthopedist, subsequently approved appellant for light-duty work with restrictions for four hours per day effective June 30, 1996. The employing establishment offered appellant a position in compliance with his restrictions and appellant returned to part-time work on July 30, 1996. Appellant worked four hours per day light duty until she went on maternity leave in November 1996.

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<sup>1</sup> The record contains a magnetic resonance imaging (MRI) scan dated November 22, 1995 that revealed a bulging disc at L4-5 and right mid-line herniation at L5-S1 with right lateral recess encroachment. Nerve conduction studies and an electromyogram performed on November 30, 1995 also stated that there was an abnormality consistent with either a right lumbosacral plexopathy or right sciatic neuropathy with "lumbar radiculopathy much less likely." An MRI of the cervical spine dated April 2, 1996 showed disc bulging at C4-5 and C5-6.

In a report dated January 10, 1997, Dr. Brigham diagnosed chronic lumbosacral strain with herniation of L4-5 and chronic cervical strain with bulging disc caused by a “work-related accident.” He indicated that appellant’s symptoms were starting to resolve and recommended a work hardening program. Dr. Brigham approved appellant for a return to work for eight hours per day two days a week and four hours per day three days a week.

Appellant remained on maternity leave until May 13, 1997 when she returned to a sedentary, modified position working only a four-hour shift, eight days a week.

A report from the rehabilitation specialist dated May 15, 1997 indicated that appellant desired to return to her regular carrier duties; therefore, additional information as to appellant’s work restrictions were requested from Dr. Avart.

In a June 2, 1997 report, Dr. Avart advised that appellant could return to her carrier duties so long as she did no outdoor walking more than two hours per day. He also placed appellant on a 20-pound weight lifting restriction.<sup>2</sup>

In a September 23, 1997 report, Dr. Avart diagnosed that appellant was suffering from a herniated disc with radiculopathy. He noted appellant’s work restrictions, which included that she not lift anything over 25 pounds without the use of a hand cart to decrease spinal pressure. Dr. Avart further stated: “[Appellant] must have a rest bar available to sit and take pressure off her back while casing mail. There is no prolonged standing allowed ... [she] is allowed to increase now to three hours [of] street work ... restrictions will last for at least four to six months and some permanent limitations and restrictions could be present.”

In a report dated December 9, 1997, Dr. Avart noted that appellant was seen on that date for neck and back pain, which radiated into her legs and worsened after prolonged sitting, driving, walking, lifting and sitting. He indicated that appellant presented with spasm, weakness and restriction of motion in the cervical and lumbar spine regions with radiculopathy. Dr. Avart noted that appellant was under work restrictions and continued with bracing, medication and restriction in her activities. He concluded that appellant’s prognosis for complete recovery was poor due to nerve and disc damage in the lumbar and cervical spine regions.

In a report dated February 18, 1998, Dr. David M. Anapolle, a Board-certified orthopedic surgeon and an Office referral physician, examined appellant. He reviewed a statement of accepted facts and noted essentially normal physical findings except for some tenderness to palpation over the midline from L4 to S1 and tightness in appellant’s legs at the hamstring muscles. Dr. Anapolle reviewed appellant’s medical records and discussed her work duties. According to him appellant sustained cervical and lumbosacral strains which were resolved at the time of his examination. He opined that appellant could return to her regular duties as a letter carrier but recommended that she gradually return to that position in order to recondition her muscles to accommodate lifting requirements in her job up to 50 pounds. Dr. Anapolle

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<sup>2</sup> The Office rehabilitation specialist noted in a September 30, 1997 report that appellant worked an eight-hour day from July 30 to September 15, 1997, casing mail, being driven to her route, then delivering mail from a bag for two hours. She was then reassigned by the employing establishment on or about September 18, 1997 to a limited-duty position working at a desk for eight hours per day.

further noted that appellant's sedentary job of prolonged sitting was physically appropriate so long as she was allowed to briefly stand and stretch her back. He concluded that "there [was] no specific treatment related to any work injury required at this time."

The Office issued a notice of proposed termination of compensation on March 31, 1998, advising appellant that the weight of the medical evidence resided with the opinion of Dr. Anapolle which established that she no longer had disability or residuals related to her work-related back condition.

In a decision dated May 14, 1998, the Office terminated appellant's compensation benefits.

Appellant requested an oral hearing, which was held on January 5, 1999. She also submitted a January 14, 1998 report from Dr. Avart which advised that appellant continue to use a push cart and rest bar to perform the requirements of her medium to heavy labor job. He noted that it was unlikely that appellant's "resultant sequela" of the disc herniation in her cervical spine and neck, lumbar spine and radiculopathy would ever heal 100 percent and opined that she would always have weakness in her neck and back. Dr. Avart recommended that appellant's work restrictions be considered permanent and scheduled appellant for a follow-up in three to four months.

In a decision dated February 8, 1999, an Office hearing representative affirmed the Office's May 14, 1998 decision.

The Board finds that the Office did not meet its burden of proof in terminating appellant's compensation effective May 14, 1998.

Once the Office accepts a claim it has the burden of proof of justifying modification or termination of compensation. After it has been determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability has ceased or is no longer related to the employment injury.<sup>3</sup>

In the instant case, the Board finds a conflict in the medical record between Drs. Avart and Anapolle as to whether appellant has any residuals related to the back conditions accepted by the Office as work related. Specifically, a conflict exists between these physicians as to whether appellant has disabling residuals due to her accepted conditions. Dr. Anapolle referred to appellant's back complaints as "asymptomatic." However, the reports of Dr. Avart found that appellant has continuing residuals due to the aggravation of her herniated disc.

The reports of Drs. Avart and Anapolle are also in dispute as to whether appellant is capable of returning to the full requirements of her regular job as a carrier with no lifting or other work restrictions. Dr. Avart provided work restrictions which were characterized as being permanent in nature. Dr. Anapolle, on the other hand, has opined that appellant could return to her regular job with no restrictions after completion of a work-hardening program.

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<sup>3</sup> *Frank J. Mela, Jr.*, 41 ECAB 115 (1989); *Mary E. Jones*, 40 ECAB 1125 (1989).

When there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Office shall appoint a third physician who shall make an examination.<sup>4</sup> Based on the above-referenced conflict in the medical evidence between Drs. Avart and Anapolle, the Board finds that the Office should have referred appellant's case for an independent medical evaluation.<sup>5</sup> The Office, therefore, improperly terminated appellant's benefits effective May 14, 1997.

The decisions of the Office of Workers' Compensation Programs dated February 8, 1999 and May 14, 1998 are hereby reversed.

Dated, Washington, D.C.  
March 27, 2000

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>4</sup> 5 U.S.C. § 8123(a); *see Dorothy Sidwell*, 41 ECAB 857 (1990).

<sup>5</sup> *See Craig M. Crenshaw Jr.*, 40 ECAB 919 (1989) (finding that the Office failed to meet its burden of proof because a conflict in the medical evidence was unresolved).