

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRENDA ROSA and U.S. POSTAL SERVICE,
POST OFFICE, Buffalo, NY

*Docket No. 99-679; Submitted on the Record;
Issued May 16, 2000*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits effective June 21, 1997.

On March 4, 1994 appellant, then a 35-year-old letter sorting machine (LSM) clerk, filed a claim alleging that she sustained a right ankle injury and hurt her back when she slipped and fell on a wet surface.¹ The Office accepted the claim for right ankle sprain and paid compensation after continuation of pay ended. On February 4, 1995 appellant returned to limited duty for four hours a day. By decision dated July 25, 1995, the Office issued a wage-earning capacity determination and appellant received compensation for the remaining four hours of wage loss. On August 12, 1995 appellant filed a separate claim for a work-related injury to her back and stopped working.

In a February 7, 1997 report, Dr. William W. Cotanch, a Board-certified neurologist, stated that he evaluated appellant for low back pain. He provided a history of appellant's back injuries she sustained at the employing establishment and noted that appellant was currently working on limited duty for four-hour days. Dr. Cotanch provided the results of his examination, reviewed objective studies and stated that there was no neurologic deficit. He opined that appellant's symptoms were musculoskeletal in origin. Dr. Cotanch recommended continued conservative medical treatment and expressed his agreement that appellant could continue to work four-hour days.

In a February 12, 1997 report, Dr. Gregory D. Lewish, a Board-certified orthopedist, diagnosed an incompletely healed lateral right ankle strain related to a work injury on March 4, 1994. Dr. Lewish felt that appellant's treatment had been appropriate but, since she still had significant pain nearly three years from the time of injury, he felt that she would most likely have some chronic discomfort in the ankle. Dr. Lewish stated that appellant had a

¹ The record indicates that appellant had previously been injured at work on July 12, 1991 and March 6, 1993.

permanent mild partial disability related to this injury, but that this did not limit her from her previous job as a postal clerk. He stated that, he understood appellant was currently on light duty, but that this was primarily due to her chronic low back pain.

In a March 14, 1997 report, Dr. Austin R. Leve, a Board-certified orthopedist and an Office referral physician, noted that he had previously examined appellant on August 27, 1996.² Dr. Leve stated that he reviewed the history as contained in his August 28, 1996 report and appellant confirmed the history with two exceptions. Appellant stated that it is not that she can not bend her knees, but in some circumstances at work there is not room physically to allow her to bend her knees and lift properly and, as a result, she has to bend forward using her back with her knees straight and that is how she initially injured her back on July 12, 1991. Appellant additionally pointed out that although she is a LSM operator, her work is not confined solely to that job and at times she is required to work in different capacities with continuous standing or using a tilt or rest stool with no back support. Dr. Leve stated that he obtained and reviewed objective tests results since his last examination, reviewed the file, which included a Statement of Accepted Facts dated March 1, 1997 and noted his findings on physical examination. Based upon his examination, Dr. Leve opined that although appellant still had complaints, there was no objective evidence of any residual disability at the level of her right ankle resulting from the injury at work on March 4, 1994. He opined that appellant had no permanent disability or functional impairment, required no further treatment and was able to work at her regular job as an LSM clerk full time without restriction or adverse effect as a result of her employment accident.

In a report dated March 18, 1997, Dr. Joel R. Hass, a Board-certified internist and appellant's treating physician, provided a history of the March 4, 1994 injury and noted that appellant continued to experience pain in lateral ankle with prolonged standing or walking, which limited daily and work activities. Dr. Haas provided the results of his examination and noted that x-rays were negative. He stated that appellant had chronic right ankle pain following a valgus sprain on March 4, 1994. Dr. Haas noted that appellant was currently at a static level and that there was a permanent mild partial disability regarding the ankle injury. An OWCP-5 form dated March 18, 1997, was provided reflecting those limitations.

In a March 19, 1997 report, Dr. Cotanch noted that appellant came to see him primarily to discuss her disability situation. He stated that he did not see her during her previous injuries, but with the history of multiple traumas she has had, Dr. Cotanch believes that her present symptoms are related to the multiple recurrent incidents at the employing establishment as previously reported. He noted that appellant stated that she was presently out of work because the employing establishment had released her and that they are unable to comply with her restrictions. Dr. Cotanch stated that appellant denied any change in her symptoms or status at this time.

² In his report of August 28, 1996, Dr. Leve opined that appellant has recovered sufficiently from the injuries to her back which occurred at work on July 12, 1991, March 6, 1993 and August 12, 1995 and the injury to her right ankle which occurred at work on March 4, 1994, to return to work at her regular full-time job without restriction.

On May 6, 1997 the Office notified appellant that it proposed to terminate her compensation benefits for her March 4, 1994 injury as she had no continuing disability causally related to her accepted employment injury based on the report of Dr. Leve. The Office allowed appellant 30 days in which to submit any additional evidence or argument.

Appellant submitted a May 23, 1997 statement in which she requested an examination by a neutral third-party physician if the Office found her evidence was not supportive of her case. Appellant additionally stated that she was supposed to be working four hours a day and since February 27, 1997, her employing establishment has not allowed her to work. Appellant contended that she was due compensation for an additional four hours a day.³

The Office terminated appellant's compensation benefits effective June 21, 1997 by decision dated June 17, 1997.

Appellant requested a hearing and submitted additional evidence. In a May 15, 1997 report, Dr. Haas wrote:

“First, I must respectfully disagree with Dr. Austin Leve’s conclusions regarding the degree of her disability, and will contend that, when [appellant’s] chronic back pain and right ankle limitations are factored together, there remains a permanent moderate disability for work and that the work restrictions dated March 18, 1997 on Form OWCP-5 should remain in effect.

“Second, I have discussed [appellant’s] ankle injury with Dr. Lewish. The statements which you have quoted are all correct, however, it must be noted that his opinion that she may return to ‘her job as postal clerk’ includes those restrictions which I have outline. When I talked personally with Dr. Lewish, he said this is evident from his report and feels that another letter of explanation is not necessary. Indeed, he will not write one. He did state that he would be free to comment should you wish to call him.”

Dr. Haas continued to submit CA-20a forms indicating that appellant was unable to return to work due to chronic conditions and coexisting problems.

A June 24, 1998 letter from Dr. Haas indicated that appellant continued to experience chronic discomfort, limitations and swelling in her right ankle due to the March 4, 1994 injury. He noted that per his report of May 15, 1997, Dr. Haas believed that appellant was left with a chronic moderate partial disability with regard to her ankle.

By decision dated August 31, 1998, the Office hearing representative affirmed the Office’s June 17, 1997 decision, on the grounds that appellant no longer had any residual disability related to the work injury. The hearing representative accorded determinative weight

³ The record reflects that appellant’s claim for a back injury (claim number A2-701217) denied continuing compensation and appellant felt she could not work without the doctor’s limitations imposed as a condition to that claim.

to the March 14, 1994 report of Dr. Leve, a Board-certified orthopedist and an Office referral physician.

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits effective June 21, 1997 due to a conflict in medical opinion necessitating referral to an impartial medical examiner pursuant to section 8123(a) of the Federal Employees' Compensation Act.

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 disabling condition has ceased or that it is no longer related to the employment.⁴

At the time the Office terminated appellant's compensation benefits, appellant's treating physician Dr. Haas continued to support that appellant had residuals of the accepted employment injury. In his March 18, 1997 report, Dr. Haas opined that appellant had a permanent mild partial disability regarding the ankle injury and provided work limitations. He further stated that appellant's chronic pain which resulted from her valgus sprain limited her daily and work activities. In his March 14, 1997 medical report, Dr. Leve, the Office referral physician, noted that although appellant still had complaints, there was no objective evidence of any residual disability from her work injury of March 4, 1994. He opined that appellant had no permanent disability or functional impairment and was able to return to her date-of-injury job without restrictions. The Board finds that the reports of Drs. Haas and Leve provide conflicting medical opinions as to whether appellant continues to suffer from residuals of her accepted right ankle strain. In situations where there exist opposing medical reports the Office should refer the case to an impartial medical examiner for the purpose of resolving the conflict. Section 8123(a) provides in pertinent part, "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."⁵

⁴ *Patricia A. Keller*, 45 ECAB 278 (1993).

⁵ 5 U.S.C. § 8123(a).

As the Office did not meet its burden of proof to terminate compensation benefits in the present case the Office of Workers' Compensation Programs' decision of August 31, 1998 is reversed.

Dated, Washington, D.C.
May 16, 2000

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member