

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LORRAINE A. ARENTS and U.S. POSTAL SERVICE,
POST OFFICE, Hauppauge, NY

*Docket No. 99-2010; Submitted on the Record;
Issued May 26, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits.

On August 25, 1995 appellant, a postal clerk, sustained an injury while in the performance of her duties. She was pulling a postal container down an aisle and facing backwards when a tray cart that was moving down an intersecting aisle struck her in the back. The Office accepted her claim for lumbosacral strain and paid compensation for temporary total disability on the periodic rolls.

In an electromyogram (EMG) report dated February 15, 1996, appellant's attending physician, Dr. Arminius Cassvan, a physiatrist and professor of clinical rehabilitation medicine, noted L5 more than S1 radiculopathy on the right and elements of L5 radiculopathy on the left. On form reports he variously diagnosed lumbosacral derangement with radiculopathy and lumbosacral sprain with fibromyalgia. He continued to report appellant's disability for the date-of-injury position. On May 2, 1996 he reported that a magnetic resonance imaging (MRI) scan done a week or two earlier showed a minimal disc bulge at the L4-5 level and disc bulging at L5-S1. When this was considered together with his EMG results, Dr. Cassvan reported that "we are clearly dealing with a radiculopathy since even a disc bulge is seen at L5-S1 and can be compatible with radiculopathy." In August 1996 he diagnosed herniated lumbosacral discs.

The Office referred appellant, together with the medical reports of file and a statement of accepted facts, to Dr. Leonard J. Infranca, a Board-certified orthopedic surgeon, for a second opinion. In a report dated July 16, 1996, Dr. Infranca related appellant's history, symptoms and

findings on examination. He diagnosed contusion and lumbosacral strain-sprain with myofascial appearing nodules at the low back. On the issue of causal relationship, Dr. Infranca reported:

“If history is correct, does exist. There is also a partial causal relation to overweight condition and postural developmental increase lumbar lordosis.

“Although there is reported radiculopathy, there appear no correlating clinical signs of a functional disability.

“Claimant reports there has been a moderate improvement since onset and although symptoms are presented at the myofascial area of the back, it is my opinion that claimant could return to work.”

Dr. Infranca described appellant’s disability status as “mild partial.” He reported that appellant could return to modified duty initially four to six hours a day with progression to an eight-hour day following three weeks of work activity.

In a report dated August 22, 1996, Dr. Bruce A. Levine, a clinical psychologist, diagnosed post-traumatic back pain and found that there was no evidence upon psychological testing of any significant depression and no evidence of malingering or symptom exaggeration.

In a report dated September 20, 1996, Dr. Russell L. Miller, an orthopedic consultant to Dr. Cassvan, related appellant’s history of injury and general medical course. He reported his findings on physical examination and noted that an EMG study done by Dr. Cassvan on February 15, 1996 revealed an L1-S2 radiculopathy on the right and an L5 radiculopathy on the left. An MRI scanning revealed disc bulges of the upper lumbar spine and spondylosis. Dr. Miller reported his diagnostic impression as status post lumbosacral strain and myositis, spondylosis of the lumbar spine and lumbar radiculopathy. He also reported that when appellant was seen there was evidence of disability and that it was felt the accident was the competent producing cause of this disability.

In a supplemental report dated October 10, 1996, Dr. Infranca stated that appellant’s residual back symptoms continued due to inactivity, as she had not been working, had an overweight condition and had weak postural muscles. Disability, he reported, was essentially a mild symptomatic partial disability. He stated that there were no signs of a functional disability for the return to work previously reported if weight reduction, active back care and back exercise were performed: “Improvement of back symptoms is expected if active back care and exercise is performed to resolve mild symptoms, which may be related to the accident of August 25, 1995.” Dr. Infranca reported that should no program of active back care, exercise and weight reduction be taken, then continuing symptoms would not be causally related and would be due to the overweight condition and poor postural muscles.

On October 29, 1996 Dr. Cassvan reported that appellant was partially disabled because of her accident and would be able to return to work if offered a desk job. He stated, however, that, if appellant returned to a job that required her to twist her body and take the mail from one side to another, she would be even more disabled.

On November 22, 1996 Dr. Miller reported that appellant complained of pain in the mid lower back from L4 to S1. There was restriction without spasm and fair straight leg raising. He advised continued conservative management and reported that appellant remained disabled.

On November 26, 1996 Dr. Cassvan reported that appellant could return to part-time work with restrictions. In a report dated January 28, 1997, he repeated that appellant was still partially disabled and could work only with severe restrictions. Dr. Cassvan stated that appellant continued to have low back pain and that this could be related to the results of an MRI that showed disc bulges at L1-2 and L2-3. He stated: "Even from the position the patient assumes when sitting, it is obvious that she has a lot of spasms."

In an undated report received by the Office on December 16, 1996, Dr. Jeffrey L. Behar, a Board-certified neurologist and consultant to Dr. Cassvan, related appellant's history of injury and his findings on examination. He noted the presence of right lower back pain to palpation. Straight leg raising was positive on the right at 40 degrees and positive on the left at 60 degrees. Gait was mildly antalgic secondary to low back pain. There were some cords of tightness along appellant's lower back. Dr. Behar gave his impression as lumbar strain with significant disc bulges, but evidence of radiculopathy on EMG. He reported that appellant should not work currently as this may exacerbate her difficulties.

Dr. Miller continued to report evidence of disability.

On January 31, 1997 the Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Jerold Gorski, a Board-certified orthopedic surgeon, for an impartial medical opinion resolving a conflict between Drs. Cassvan and Infranca on the issues of causal relationship and continuing disability.

In a report dated February 25, 1997, Dr. Gorski related appellant's history. He noted that appellant wanted to return to work and felt comfortable that she would successfully function at a desk job. She was put back into a job that required twisting, however, and had a recurrence of her back pains. Dr. Gorski described his findings on examination and summarized certain medical records. Responding to questions posed by the Office, Dr. Gorski reported that, on objective physical examination, appellant had no objective compensable sequelae of lumbosacral sprain occurring on August 25, 1995. He stated that appellant suffered from chronic low back pain, that she had moderate obesity and that this might explain her complaints: "Certainly a sprain and contusion would be expected to be short lived." Dr. Gorski reported that the August 25, 1996 injury was not an aggravation of a preexisting condition but had resulted in a protracted and unresolved conflict with the Office. "Her recovery and return to work status apparently in her mind results from a conflict solely as to what her capabilities are and what she is able to perform. As a result of any protracted conflicts, the underlying medical conditions may take on the nature of a chronic disease process until the issue is satisfactorily resolved." Dr. Gorski reported that no further diagnostic tests were indicated. Nerve blocks were inappropriate. Appellant was on medication that she felt to be helpful, therefore, he would not make any changes. Dr. Gorski reported that the continuous standing, stretching and reaching of a distribution clerk position was unsatisfactory and not advised. He recommended a modified position initially for six hours on a trial basis, with attempts at increasing the level to a full eight-hour period of time with standing and walking intermittently as required. Dr. Gorski also recommended an offer of vocational rehabilitation services such as work hardening.

On a work capacity evaluation dated February 25, 1997, Dr. Gorski indicated that none of appellant's limitations were due to the accepted employment injury.

On March 11, 1997 the Office notified appellant that it proposed to terminate her compensation benefits. The Office found that Dr. Gorski's opinion represented the weight of the medical evidence and established that appellant had no continuing employment-related disability as a result of the August 25, 1995 injury.

In a decision dated April 14, 1997, the Office terminated appellant's compensation benefits effective April 27, 1997.

In a report dated April 24, 1997, Dr. Cassvan advised the Office as follows:

"I would like to bring to your attention the discrepancy in what you consider to be fair regarding [appellant], who is my patient since August 25, 1995. The major discrepancy is the fact that Dr. Gorski is denied by you in terms of her work restrictions clearly designated by a simple sentence which has no merit stating that this restriction is not due to his 'employment injury.'" From all of my reports and from Dr. Gorski's reports it can be concluded only that it has a lot to do with her compensation injury, which caused a lot of distress to this patient who suffers not only from low back in a kind of chronic stage at this point but it is associated by now with an element of stress translated into high blood pressure which is threatening to her life. In my career of physiatrist of over 25 years I have never faced such a stubborn opposition to a very simple thing to solve, namely giving her a job which takes into consideration not my restrictions but Dr. Gorski's suggested restrictions for [appellant]. I will not rest until this problem is solved."

Dr. Cassvan continued to report that appellant was totally disabled for usual work as a result of low back pain and right sciatica due to the employment injury of August 25, 1995.

On September 25, 1997 an Office hearing representative set aside the Office's termination of compensation benefits. The hearing representative found that Dr. Gorski did not indicate whether appellant's inability to perform some of the physical requirements of her regular position was due to the accepted work injury or to her chronic low back pain. The hearing representative reasoned that, because the Office undertook to develop the evidence by referring the case to an Office referral physician, it had an obligation to seek clarification from its physician upon receiving a report that did not adequately address the issues that the Office sought to develop. The hearing representative instructed the Office to obtain a supplemental report from Dr. Gorski clarifying his opinion whether the claimant has any residuals of the August 25, 1995 work injury and whether the work restrictions identified were due to residuals of the work injury.

The Office obtained a supplemental report dated October 21, 1997. Dr. Gorski reported as follows:

“At your request for more information about [appellant], the following is submitted. I examined the patient on February 25, 1997. She claimed injuries to the lower lumbar area at that time.

“[Appellant] does not have any residuals from her work-related injury, and there are no restrictions as to her work ability. The work capacity evaluation form does not reveal residuals from the work-related injury or any work restrictions as a result of her work-related injury.”

On November 19, 1997 the Office again proposed to terminate appellant’s compensation benefits. In a decision dated December 22, 1997, the Office terminated appellant’s compensation effective January 4, 1997.¹

In a September 25, 1997 report, Dr. Cassvan reported that appellant was still in a great amount of pain. Straight leg raising was positive on the right at 40 degrees and on the left at 45 degrees. Patrick’s sign was positive on the right with significant pain in the low back area. There was extreme weakness of the toes in extension on the right for both big and small toes. There was muscle spasm in the lumbosacral area and bending was not done in order not to aggravate the situation. Dr. Cassvan continued to consider appellant disabled but stated that she could work in limited capacity doing a desk job.

In a decision dated November 13, 1998, a hearing representative affirmed the Office’s December 22, 1997 decision terminating appellant’s compensation. The hearing representative found that Dr. Gorski’s reports represented the weight of the medical evidence.

Appellant requested reconsideration and submitted additional evidence. In a December 30, 1998 report, Dr. Richard Grosso, a chiropractor, diagnosed, among other things, subluxation at L4-5 and L5-S1. He did not report that he had obtained x-rays. Dr. Grosso stated that appellant was totally disabled and would remain so indefinitely.

In a decision dated March 20, 1999, the Office denied a merit review of appellant’s claim. The Office found that the report of Dr. Grosso was of no probative value as his opinion was outside the area of his expertise as defined by the Federal Employees’ Compensation Act.

Appellant again requested reconsideration and submitted additional evidence. In an April 7, 1999 report, Dr. Hank Ross, an orthopedist, briefly related appellant’s history without specifically describing the employment injury. He stated that he had discussed the risks, alternatives and benefits of all forms of treatment with appellant. Dr. Ross added: “I do believe that she does have a permanent, partial disability and that she will be unable to return to her full previous job. However, she could do limited duty, with certain considerations, such as being able to stand and sit, intermittently, and not lift anything over 20 pounds.” Causal relationship does exist, he stated, if the history was correct.

¹ Appellant’s benefits were in fact terminated effective January 4, 1998. The effective date noted in the Office’s December 22, 1997 decision appears to be a typographical error.

In a decision dated May 11, 1999, the Office reviewed the merits of appellant's claim but denied modification of its prior decision.

The Board finds that the Office properly terminated compensation benefits for the accepted condition of lumbosacral strain.

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 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 The Office's procedure manual provides that, having accepted a claim and initiated payments, the Office may not terminate compensation without a positive demonstration, by the weight of evidence, that entitlement to benefits has ceased.⁴ The inadequacy or absence of a report in support of continuing benefits is not sufficient to support termination, and benefits should not be suspended for that reason.⁵

The Office accepted that appellant sustained a lumbosacral strain on August 25, 1995 while in the performance of her duties. The Office did not accept the conditions of lumbosacral derangement or bulging discs, or radiculopathy or sciatica. To meet its burden of proof, the Office need only establish that appellant no longer suffers from the lumbosacral strain she sustained on August 24, 1995.

To resolve a conflict between appellant's attending physician, Dr. Cassvan, and the Office referral physician, Dr. Infranca, on the issues of causal relationship and continuing disability, the Office referred appellant, together with the case record and a statement of accepted facts to Dr. Gorski for an impartial medical opinion. In his February 25, 1997 report, Dr. Gorski related appellant's history, described his findings on examination and summarized certain medical records. Specifically addressing questions posed by the Office, he reported that appellant had no objective sequelae of the lumbosacral sprain occurring on August 25, 1995. He observed that certainly a sprain and contusion would be expected to be short-lived. Appellant suffered from chronic low back pain, he explained and her moderate obesity might explain her complaints. He further explained that, as a result of any protracted conflicts, such as the unresolved conflict with the Office, underlying medical conditions may take on the nature of a chronic disease process until the issue is satisfactorily resolved. Although Dr. Gorski indicated that appellant could perform a modified position with increasing hours, he reported that none of appellant's limitations were due to the accepted employment injury. In a supplemental report dated October 21, 1997, Dr. Gorski made clear that appellant had no residuals from her work-related injury and no restrictions as a result of her work-related injury.

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

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

⁴ Federal (FECA) Procedure Manual, *supra* note 2, *Periodic Review of Disability Cases*, Chapter 2.812.3 (July 1993).

⁵ *Id.*, Chapter 2.812.7(c)(1).

When there exist opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁶ The Board finds that Dr. Gorski's opinion is based on a proper background and is sufficiently rationalized to establish that appellant no longer continues to suffer from the accepted condition of lumbosacral strain. As the Office has met its burden of proof to establish that appellant no longer suffers from this condition, the Board will affirm the Office's May 11, 1999 and November 13, 1998 decisions accordingly.

The Board notes that months after the August 25, 1995 employment injury Dr. Cassvan himself stopped diagnosing lumbosacral sprain and began consistently reporting lumbosacral derangement, radiculopathy and bulging discs. He reported that appellant's low back pain could be related to the results of an MRI that showed disc bulges at L1-2 and L2-3. The Office has not accepted these medical conditions, so appellant bears the burden of proof to establish the element of causal relationship. The medical opinion evidence of record, however, fails to provide sound medical reasoning explaining, from a medical point of view, how the incident that occurred on August 25, 1995 caused the bulging discs and radiculopathy reported by Dr. Cassvan.

The May 11, 1999 and November 13, 1998 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
May 26, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

⁶ *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).