

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of PAMELA NOVAK and U.S. POSTAL SERVICE,  
WAUWATOSA BRANCH, Wauwatosa, WI

*Docket No. 99-860; Submitted on the Record;  
Issued November 20, 2000*

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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.

On October 15, 1997 appellant, then a 34-year-old distribution clerk, filed a claim for muscle strain and spasms in her lower back which she related to lifting heavy mail sacks and reaching and throwing heavy parcels and bundles of magazines. The Office accepted appellant's claim for low back strain and permanent aggravation of spondylolisthesis at L5-S1. She stopped working May 20, 1988 and returned to work, four hours a day, effective February 7, 1989. The Office paid temporary total disability compensation for the period appellant did not work and began paying her compensation for four hours a day.

On August 15, 1995 the employing establishment offered appellant a modified distribution clerk position for eight hours a day. She accepted the offer and returned to full-time work on August 25, 1995. Appellant subsequently used sick leave for several days and, on October 17, 1995, submitted a physician's note restricting her to four hours of work a day. The Office paid compensation for four hours a day for the period October 11 through November 28, 1995. In a May 20, 1996 decision, the Office denied appellant's claim for compensation for the period beginning November 29, 1995 on the grounds that the medical evidence of record showed that she could work eight hours a day. She requested a hearing before an Office hearing representative which was conducted on January 30, 1997. At the hearing, the Office hearing representative found that there existed a conflict in the medical evidence and summarily remanded the case for referral of appellant to an appropriate impartial medical specialist. In a November 19, 1997 decision, the Office terminated appellant's compensation effective November 29, 1995 on the grounds that the medical evidence of record established that she did not have any residuals from her accepted employment injury. She requested a hearing before an Office hearing representative which was conducted on April 27, 1998. In a September 10, 1998 decision, the Office hearing representative found that the Office had met its burden of proof in terminating appellant's compensation. She therefore affirmed the Office's November 19, 1997 decision.

The Board finds that the Office met its burden of proof in terminating appellant's compensation.

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 disability has ceased or that it is no longer related to the employment.<sup>1</sup>

In a November 9, 1987 report, Dr. John J. Fahey, a Board-certified rheumatologist, stated that appellant's history was consistent with recurrent problems with her back, aggravated by heavy lifting. He commented that appellant's back did not seem to tolerate heavy lifting. Dr. Fahey placed appellant on permanent light duty, indicating that she should not be required to do consistent heavy lifting in the future. In an October 17, 1988 report, Dr. Patrick W. Cummings, a Board-certified orthopedic surgeon, stated that x-rays from December 30, 1987 showed appellant had a Grade I spondylolisthesis at L5-S1. He indicated that the spondylolisthesis was a preexisting condition that became symptomatic as a result of appellant's work exposure at the employing establishment. Dr. Cummings concluded that appellant's current symptoms were due to the repetitive work requirements at the employing establishment. He stated that appellant's spondylolisthesis was permanently aggravated beyond normal progression. Dr. Cummings indicated that appellant was not totally disabled for gainful employment but could return to her job full time with some work restrictions. He subsequently restricted appellant to working four hours a day. The Office referred appellant to Dr. Elliot L. Coles, a Board-certified orthopedic surgeon, for an examination. In a November 12, 1990 report, he stated that appellant had a permanent disability in her lower back, secondary to spondylolisthesis, a preexisting condition which was temporarily aggravated by appellant's employment. Dr. Coles concluded that no structural damage to appellant's lower back had occurred and no permanent acceleration or aggravation of her preexisting condition had occurred. The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Thomas E. Ryan, a Board-certified orthopedic surgeon, for an examination. In a November 4, 1991 report, he concurred with Dr. Cummings that appellant had lumbosacral spondylolisthesis which was present before appellant's employment. Dr. Ryan stated that the aggravation of this activity caused the discomfort to become clinically apparent but indicated that it did not accelerate the process. He concluded that the aggravation was permanent.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Anoo P. Patel, a Board-certified orthopedic surgeon, for an examination and opinion on appellant's ability to work. In an August 8, 1994 report, he stated that the examination, history and review of the medical records seemed to confirm the diagnosis of Grade I spondylolisthesis manifested by work injury and work exposure at the employing establishment. Dr. Patel stated that appellant was not capable of working with her regular job description but was capable of working eight hours a day with restrictions. He commented that appellant had a permanent impairment of backache caused by certain activities which placed

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<sup>1</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989).

stress to the lumbar spine, manifesting as pain. The Office based its job offer on Dr. Patel's report.

In a November 30, 1995 report, Dr. Cummings stated that appellant's current symptom of chronic low back pain was still related to her underlying diagnosis. He noted appellant returned to an eight-hour workday on August 25, 1995. Dr. Cummings commented that after working a few weeks appellant's back symptoms were aggravated by the longer workday. He indicated that by September 10, 1995 appellant was unable to continue working. Dr. Cummings related that she returned to work and attempted to work eight hours a day but by October 11, 1995 was again unable to continue work. He therefore restricted appellant to working four hours a day. Dr. Cummings recommended that appellant had a permanent work schedule of four hours a day, five days a week.

The Office referred appellant back to Dr. Patel for an examination. In a March 8, 1996 report, he commented that appellant's objective findings had remained the same since he had previously examined appellant. Dr. Patel stated that, despite the subjective symptoms of weakness and decreased endurance, he found no objective findings to support the subjective symptoms. He concluded that appellant had reached a healing plateau and her symptoms were a manifestation of her preexisting spondylolisthesis. Dr. Patel indicated that if there was any progression of the condition, it was on a subjective basis and not sustained by any objective findings. He concluded that appellant was physically capable of performing the duties of the offered position of modified distribution clerk eight hours a day. Dr. Patel explained that appellant was out of condition and not used to physical activity, had low physical endurance to any activities and might find herself not able to work eight hours a day on a subjective hearing.

In a July 2, 1996 report, Dr. John S. Phillips, a Board-certified orthopedic surgeon, noted that appellant had spondylolysis and spondylolisthesis. He stated that appellant had definite pathology in the lumbar area which was the sole cause of her pathology. Dr. Phillips indicated that appellant's current work restrictions of four hours a day were necessary because of her back condition. He commented that it would be completely unreasonable to expect appellant to increase her level of work for the foreseeable future. Dr. Phillips recommended surgery.

The first Office hearing representative found that there existed a conflict in the medical evidence between Drs. Phillips and Cummings on the one hand and Dr. Patel on the other hand. He therefore remanded the case for referral of appellant to an appropriate impartial medical specialist. The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. J. Christopher Noonan, a Board-certified orthopedic surgeon. In a May 9, 1997 report, he noted that a 1993 report from a magnetic resonance imaging scan showed degenerative disc disease in the lumbar region of the spine with associated spondylolisthesis and spondylolysis at the lumbosacral level. Dr. Noonan related that x-rays from March 1993 also showed a Grade I spondylolisthesis secondary to spondylolysis at L5-S1. He diagnosed preexisting spondylolysis with Grade I spondylolisthesis of L5 on S1, lumbar strain or temporary aggravation of underlying spondylolysis and spondylolisthesis and probable depression. Dr. Noonan stated that appellant was able to return to her usual position as a distribution clerk on a full-time basis without modification of the position. He indicated that appellant did not have any permanent partial disability or permanent work restrictions due to the work-related injury. Dr. Noonan commented that a literature search showed that there existed a small percentage of

incidents of spondylolysis with a mild spondylolisthesis in the population. He noted, however, that this population was not necessarily susceptible to more work-related injuries. Dr. Noonan indicated that, although this group might have a slight increase in occurrences of back pain, the back pain did not necessarily cause them a significant disability. He concluded that appellant had a preexisting spondylolysis with a Grade I spondylolisthesis that was aggravated on a temporary basis by her work-related injury. In situations when there exists opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial 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.<sup>2</sup> In this case, Dr. Noonan had an accurate history of appellant's work-related injury and subsequent treatment. He presented a sufficiently rationalized opinion showing that appellant's preexisting back condition was only temporarily aggravated by her employment. Dr. Noonan established that appellant was able to return to her regular duties full time. Appellant would be entitled to compensation only for the period of disability caused by the employment-related aggravation of the underlying, preexisting back condition. Once the disability due to the aggravation ceased, appellant was no longer entitled to compensation.<sup>3</sup> Dr. Noonan's report therefore established that, since the work-related aggravation of appellant's preexisting condition had ceased, she was no longer entitled to compensation. His report presents sufficient support to satisfy the Office's burden of proof to terminate appellant's compensation.

The decision of the Office of Workers' Compensation Programs dated September 10, 1998 is hereby affirmed.

Dated, Washington, DC  
November 20, 2000

David S. Gerson  
Member

Willie T.C. Thomas  
Member

A. Peter Kanjorski  
Alternate Member

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<sup>2</sup> *James P. Roberts*, 31 ECAB 1010 (1980).

<sup>3</sup> *James L. Hearn*, 29 ECAB 278 (1978).