

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of FRANCES M. FORTUGNO and U.S. POSTAL SERVICE,  
POST OFFICE, City of Industry, CA

*Docket No. 99-2419; Submitted on the Record;  
Issued November 7, 2000*

---

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,  
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's medical benefits effective March 9, 1998 on the grounds that she no longer had residuals from her January 8, 1996 and February 8, 1997 employment injuries.

The Office accepted appellant's condition for lumbar sprain and sacroiliitis resulting from her January 2, 1996 employment injury. On December 17, 1996 she requested compensation for the period January 8 through December 17, 1996 and submitted evidence to support her claim including a report dated January 14, 1996 from her treating physician, Dr. James S. Shafer, a Board-certified orthopedic surgeon.

In his January 14, 1996 report, Dr. Shafer considered appellant's history of injury, performed a physical examination and reviewed x-rays. He diagnosed lumbosacral strain, lumbar scoliosis and tropism, or sclerosis at L5-S1. Dr. Shafer stated:

“[Appellant] experienced a *traumatic isolated injury* of her low back, while at work on January 2, 1996, carrying her mail and entering/exiting her postal vehicle. (Emphasis added.)

“The preexisting and underlying changes in her lumbar spine noted on x-ray may have contributed to the event, but the causation was the work activity as described above.”

He stated that it was “anticipated” that her period of symptoms and disability would be temporary, several weeks to a couple of months.

In response to the Office's request for additional evidence, appellant submitted work status reports dated February 11 and 25, and March 18, 1997 and a work restriction evaluation dated March 21, 1997 from Dr. Shafer reiterating that she required restrictions.

On February 12, 1997 appellant filed an occupational disease claim, Form CA-2, alleging that she sustained aggravation of her lumbar strain and sacroiliitis on February 8, 1997.

By decision dated April 14, 1997, the Office denied appellant's claim for compensation in 1996, stating that the medical evidence of record failed to establish that the time appellant lost from work was a result of her accepted work conditions.

By letter dated June 3, 1997, the Office informed appellant that it accepted her claim for aggravation to lumbar spine and left sacroiliac joint.

By decision dated July 10, 1998, the Office denied, in part, appellant's claim for disability compensation for the period February 10 through May 2, 1997 stating that the evidence failed to establish that appellant was disabled due to the February 8, 1997 employment injury.<sup>1</sup>

The Office referred appellant to Dr. J. Pierce Conaty, a Board-certified orthopedic surgeon, for an evaluation. In his report dated September 26, 1997, Dr. Conaty considered appellant's history of injury, performed a physical examination, and reviewed x-rays dated January 8, 1996. He diagnosed mild lumbar scoliosis with associated facet abnormalities at the lumbosacral junction. Dr. Conaty stated that the 1996 employment injury was a soft tissue lumbosacral strain superimposed on appellant's preexisting mild scoliosis. He stated that there were no continuing residuals of the back injury, that appellant's present complaints were due to the preexisting scoliosis which was permanent. Dr. Conaty added that the effects of appellant's soft tissue injury had resolved as appellant had normal range of motion and no significant neurologic deficits. He stated that appellant required light-duty work.

In a report dated April 30, 1997, Dr. Shafer considered appellant's history of her two injuries, performed a physical examination and reiterated his diagnosis of lumbosacral strain, lumbar scoliosis, tropism or sclerosis at L5-S1, and additionally diagnosed probable chronic strain of the left sacroiliac joint. On physical examination, he stated that appellant had similar symptoms "in the exact location she always had, *i.e.*, in the left-sided low back ... with pain and tenderness extending toward the left sacroiliac joint." Dr. Shafer found that appellant exhibited 80 percent of normal range of motion of the low back. He noted that appellant was in the final month of her pregnancy. Dr. Shafer stated that appellant's condition was a "flare-up" of the January 2, 1996 employment injury, meaning it was an exacerbation, not a new injury.

In an attending physician's report, Form CA-20, dated October 28, 1997, for his findings and diagnosis, Dr. Shafer referred the Office to his most recent report, apparently the one dated April 30, 1997. In the October 28, 1997 report, he checked the "yes" box that appellant's condition was caused or aggravated by her employment and stated that she was carrying mail, got trapped in a hole and caught herself with her left leg upon recovery. Dr. Shafer stated that appellant required permanent work restrictions.

---

<sup>1</sup> Specifically, the Office denied appellant disability benefits for the following dates in 1997: February 10, 13, 15 and 20 through February 22, March 1, 4, 6, 11, 13, 15 and 27, April 11, 14 and April 21 through 26 and April 30 through May 2.

On February 5, 1998 the Office issued a notice of proposed termination of medical benefits stating that the weight of the medical evidence established that appellant no longer had residuals as a result of her work injuries. The Office gave appellant 30 days to submit additional evidence.

In a report dated January 8, 1998, received by the Office on February 23, 1998, Dr. Shafer reviewed appellant's history of injury, performed a physical examination and reviewed a magnetic resonance imaging (MRI) scan which showed a posterior disc bulge or protrusion at L5-S1 with pressure on the nerves to the left. He reiterated his prior diagnoses and additionally diagnosed lumbar degenerative disc disease at L5-S1, lumbar strain and left sacroiliitis, and chronic strain of the left sacroiliac joint.

Dr. Shafer stated that, after the January 2, 1996 employment injury, appellant was on modified duty because of the pathology in her back and resultant symptoms, she was unable to carry the 40-pound satchel as part of her work requirements and used a cart, but the cart, which weighed 18 pounds, caused problems when she had to climb steps.

Dr. Shafer noted that appellant's job required frequent bending, stooping and twisting, and lifting involving her back. The February 8, 1997 incident jerked her back while working, and caused a flare-up or exacerbation of symptoms related to the January 2, 1996 employment injury and the pathology in her lower back. Dr. Shafer stated:

“The type of work [appellant] did prior to and subsequent to the [January 2, 1996 employment injury], *i.e.*, bending, lifting, stooping, twisting and carrying would indeed contribute to and accelerate problems in her low back.

“Also noted is a left convex scoliosis in the lumbar region which, of course, is naturally-occurring, but this, too, would become symptomatic when aggravated by the work efforts as outlined above.”

By decision dated March 9, 1998, the Office terminated benefits, finding that the weight of the medical evidence was represented by the report of Dr. Conaty which established that appellant no longer had residuals from her January 2, 1996 employment injury.

By letter dated March 5, 1999, appellant requested reconsideration of the Office's decision and submitted a medical report dated April 29, 1998 from Dr. Jacob E. Tauber, a Board-certified orthopedic surgeon, and a June 8, 1998 report from Dr. Shafer. Dr. Tauber considered appellant's history of injury, performed a physical examination and reviewed x-rays. He diagnosed spinal stenosis with sciatica. Dr. Tauber stated that appellant's lumbosacral strain made her spinal stenosis symptomatic and that her spinal stenosis preexisted her employment injury. He noted that appellant performed her job without restriction until her January 2, 1996 employment injury and therefore her work injury caused her conditions to become symptomatic.

In his June 8, 1998 report, Dr. Shafer stated that appellant's condition had not changed in the past three visits. He stated:

“The obvious *medical connection between [appellant’s] current medical status and the work injuries*, is, as should be obvious from the facts in this case, the stated and accepted work injuries and the ongoing, repetitive, cumulative work traumata, resulting in subjective pain in the low back, as well as periods of disability necessitating work modification, use of a cart, etc., etc. etc. (Please see and read all of my previous reports).

“Furthermore, the *objective medical findings* are the x-ray findings of tropism, degenerative disc disease and lumbar scoliosis; and the MRI findings of degenerative disc disease and bulging lumbar disc with pressure upon the neural elements on the left. This is what is meant in the industrial medical circles as *objective medical findings!*” (Emphasis added.)

Dr. Shafer stated that appellant required light-duty work. He further stated:

“[Appellant] has preexisting, ongoing lumbar scoliosis, facet irregularity/tropism and degenerative disc disease, as evidenced by x-rays and MRI scan. She has experienced two documented, accepted work injuries of her low back and there is obvious ongoing, cumulative, work traumata/aggravation of her condition by lifting, carrying and delivery of mail. This connects her present symptoms and disability to the work injuries, superimposed on her prior condition. This all served to render her symptomatic and produced disability, which persists.”

By decision dated April 26, 1999, the Office denied appellant’s request for reconsideration. The Office found that the evidence appellant submitted was cumulative and not sufficient to warrant review of the prior decision. However, in the memorandum to the decision, the Office found that the evidence of record did not establish that appellant’s back condition was work related and the weight of medical opinion remained with Dr. Conaty. Therefore, the Board finds, the Office actually performed a merit review and denied modification of the prior decision.

The Board finds that the Office properly terminated appellant’s medical benefits.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation or medical 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.<sup>2</sup> The Office’s burden of proof includes the necessity of furnishing rationalized medical evidence based on a proper factual and medical background.<sup>3</sup>

Under the Federal Employees’ Compensation Act,<sup>4</sup> when employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation for the

---

<sup>2</sup> *Patricia M. Mitchell*, 48 ECAB 371 (1987); *Patricia A. Keller*, 45 ECAB 278 (1993).

<sup>3</sup> *Larry Warner*, 43 ECAB 1027 (1992); *see Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>4</sup> 5 U.S.C. §§ 8101-8193.

periods of disability related to the aggravation.<sup>5</sup> However, when the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased.<sup>6</sup> This is true even though the employee is found medically disqualified to continue in such employment because of the effect which the employment factors might have on the underlying condition. Under such circumstances, the employee's disqualification for continued employment is due to the underlying condition without any contribution by the employment.<sup>7</sup>

The Office terminated appellant's compensation benefits based on the report of Dr. Conaty who found that appellant's accepted lumbosacral strain had resolved without residual disability. The Office has not accepted that appellant's injury caused or aggravated her preexisting spinal scoliosis and appellant has the burden of proof in this regard.

In his June 8, 1998 report, Dr. Shafer stated that appellant's preexisting scoliosis was exacerbated by her January 2, 1996 and February 8, 1997 employment injuries and that appellant became symptomatic from her work activities of lifting, carrying and delivering mail. He did not provide sufficient medical rationale for his conclusion that appellant's work activities permanently aggravated her spinal scoliosis and therefore his opinion is not probative.<sup>8</sup>

Dr. Shafer stated that his opinion was based on objective medical findings as shown by x-ray and MRI scan, but these finding document appellant's preexisting conditions of tropism, degenerative disc disease and scoliosis. They do not establish the causal effect of any work factors on appellant's back condition. In fact, as Dr. Shafer noted, appellant has not worked at the employing establishment since prior to the birth of her third child in May 1997 and her symptoms of low back pain have improved since then.

Similarly, Dr. Tauber's April 27, 1998 report in which he also stated that appellant's 1996 and 1997 employment injuries rendered her back condition symptomatic also lacks medical rationale explaining how employment factors caused permanent damage to her back. In his September 26, 1997 report, the referral physician, Dr. Conaty, found no objective findings of the accepted soft tissue injury, normal range of motion and no significant neurologic deficits. He concluded that appellant had no continuing residuals of her back injuries and that her present complaints were due to her permanent, preexisting condition of scoliosis. Dr. Conaty's report is well rationalized and supports the Office's termination of medical benefits.

The decision of the Office of Workers' Compensation Programs dated April 26, 1999 is hereby affirmed.

Dated, Washington, DC  
November 7, 2000

---

<sup>5</sup> *Gary R. Sieber*, 46 ECAB 215, 222 (1994); *Richard T. DeVito*, 39 ECAB 668, 673 (1988).

<sup>6</sup> *Gary R. Sieber*, *supra* note 5 at 222.

<sup>7</sup> *Gaetan F. Valenza*, 39 ECAB 1349, 1356 (1988).

<sup>8</sup> *See Gary R. Sieber*, *supra* note 5.

Willie T.C. Thomas  
Member

Michael E. Groom  
Alternate Member

Priscilla Anne Schwab  
Alternate Member