

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NANCY T. HOU and U.S. POSTAL SERVICE,
FLUSHING ANNEX, Flushing, NY

*Docket No. 99-2214; Submitted on the Record;
Issued June 27, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, 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 compensation effective July 20, 1997.

On April 20, 1988 appellant, then a 38-year-old letter sorting machine clerk, filed a claim for an injury to her spine, sustained when a cart struck her in the back. The Office accepted that appellant sustained a subluxation at L4-5 and she received continuation of pay from April 21, 1988 until she returned to work for four hours a day on June 6, 1988. The Office also accepted that appellant sustained recurrences of disability due to her April 20, 1988 injury between August 20, 1988 and May 29, 1990.

On November 7, 1996 appellant accepted an offer from the employing establishment of a limited-duty position for four hours a day. On March 21, 1997 the Office referred appellant, her medical records and a statement of accepted facts to Dr. Howard Finklestein, a Board-certified orthopedic surgeon, for a second opinion on her disability and its relationship to her April 20, 1988 employment injury. Based on his April 11, 1997 report, the Office issued a notice of proposed termination of compensation on April 18, 1997. By letter dated May 14, 1997, appellant expressed her disagreement with the proposed termination of compensation and submitted additional medical reports from her attending physicians, Dr. Jia-Rhon Chen, a Board-certified neurologist, and Dr. Richard Pashayan, a chiropractor.

By letter dated May 19, 1997, the Office advised appellant that there was a conflict of medical opinion between Drs. Pashayan, Chen and Finklestein. To resolve this conflict, the Office referred appellant, the case record and a statement of accepted facts to Dr. Robert L. Swearingen, a Board-certified orthopedic surgeon.

In a report dated June 10, 1997, Dr. Swearingen reviewed appellant's history and medical records, noting that there were "references to three MRIs [magnetic resonance imaging scans] but I only have report[s] of two of them which show degenerative changes." He concluded:

"There is no indication that [appellant] is suffering from any disabling residual from the incident of April 20, 1988. The mechanism of the injury as she described would more likely have caused bone damage, which did not show up on x-ray, or soft tissue damage in the form of a contusion, which would have cleared. It certainly was not the usual mechanism for a herniated disc. Because of the discrepancies in the readings of the MRIs and CT [computerized tomography] scans, the ideal would be to assimilate all the studies and have them presented to an independent neuroradiologist. I would expect that he/she would note that the changes in question were degenerative in nature covering a broad area and not more localized changes related to trauma.

"As regard to what conditions [appellant] is suffering from now, etc. -- I can[not] find [any] evidence that the claimant is suffering from any conditions which are related to any on-the-job injury nor can I find anything in the exam[ination] which would preclude her from working in her prior capacity. [Appellant] had no objective findings at the clinical exam[ination], *i.e.*, she was found to be able to use her body in a manner which would allow her to do the work of sorting, etc. It is noted that there were many signs of symptom magnification present indicative of pain expressed which had no organic basis, *e.g.*, pain with light touch, pain with splinted rotation and axial compression."

By letter dated June 20, 1997, the Office advised appellant that Dr. Swearingen recommended having the films of the MRIs, CT scans and x-rays read by an independent neuroradiologist. The Office requested that appellant submit releases within 10 days to allow the Office to obtain these films from her treating physicians. In a letter dated June 23, 1997, Dr. Swearingen recommended that the diagnostic studies be submitted to Dr. Bruce Zablou, a Board-certified radiologist, who was excellent in explaining whether disc changes were degenerative or traumatic.

By letter dated July 14, 1997, the Office advised Dr. Swearingen that it had unsuccessfully attempted to obtain appellant's films for review by an independent neuroradiologist, per his recommendation. Noting that Dr. Swearingen had stated: "There is no indication that [appellant] is suffering from any disabling residual" of the April 20, 1988 injury, the Office asked whether it was necessary to have the films reviewed by a neuroradiologist to determine her current disability.

In a report dated July 16, 1997, Dr. Swearingen stated:

"In response to your letter of July 14, 1997, in my opinion it is not NECESSARY to obtain a reading of the various CT scans, x-rays and MRIs on [appellant] by a neuroradiologist. On the basis of my clinical exam[ination], it is my opinion that she had no disabilities which came from the incident of April 20, 1988.

“The review was recommended as frequently the uninitiated believe that MRI and CT scan readings are the ‘gold plate’ criteria for disability, whereas indeed there is great variation in the interpretations given to the same study. These studies should be used to assist the clinical exam[ination] which in my opinion, remains the best criterion. [Appellant’s] studies varied in interpretation from mild degenerative changes to a herniated nucleus pulposus. It was my intent by getting an independent neuroradiologist to review all of them to substantiate that what we are dealing with are degenerative changes, not traumatic changes and that the changes do not have any real clinical significance (without clinical corroboration). If the films can[not] be obtained, the clinical exam[ination] stands on its own.

“In summary, [appellant] does not have any current disability residuals or physical limitations as a result of the employment injury of April 20, 1988. This statement is based on an independent medical exam[ination] performed on June 10, 1997. It was also noted at the time of the exam[ination] that there were strong indications of symptom magnification.”

By decision dated July 17, 1997, the Office terminated appellant’s compensation effective July 20, 1997. The Office noted that appellant did not sign and return the release forms as requested and found that the opinion of Dr. Swearingen constituted the weight of the medical evidence.

Appellant requested a hearing, which was held on January 13, 1998. She submitted additional reports from Drs. Chen and Pashayan and a copy of her authorization, signed and dated June 29, 1997, for any physician or hospital to furnish any desired information to the Office. Appellant’s representative at the hearing testified that appellant told him that she signed the release on June 29, 1997 and sent it to the Office.

By decision dated March 23, 1998, an Office hearing representative found that the Office properly terminated appellant’s compensation, on the grounds that Dr. Swearingen’s reports constituted the weight of the medical evidence and established that appellant’s disability related to her April 20, 1988 employment injury had ceased. By letter dated March 4, 1999, appellant requested reconsideration and submitted additional reports from Drs. Chen and Pashayan. By decision dated May 25, 1999, the Office found that the additional evidence was not sufficient to warrant modification of its prior decisions.

The Board finds that the Office met its burden of proof to terminate appellant’s compensation effective July 20, 1997.

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.¹

¹ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

The Board has held that when a case is referred to an impartial medical specialist for the purpose of resolving a conflict in medical opinion evidence, the opinion of such specialist, if sufficiently well rationalized and based on a proper medical background, must be given special weight.² The Board has also held that in a situation where the Office secures an opinion from an impartial medical specialist and the opinion from such specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report.³

There was a conflict of medical opinion in this case between appellant's attending physicians, Drs. Chen and Pashayan and the Office's referral physician, Dr. Finklestein, on whether appellant continued to have any disability causally related to her April 20, 1988 employment injury. To resolve this conflict of medical opinion, the Office, pursuant to section 8123(a) of the Federal Employees' Compensation Act,⁴ referred appellant to Dr. Swearingen, a Board-certified orthopedic surgeon.

In his June 10, 1997 report, Dr. Swearingen stated: "There is no indication that [appellant] is suffering from any disabling residual from the incident of April 20, 1988," explaining that the mechanism of her injury was not the usual mechanism for a herniated disc and "would more likely have caused bone damage, which did not show up on x-ray, or soft tissue damage in the form of a contusion, which would have cleared." Noting that he had results of only two of the three MRIs, Dr. Swearingen stated: "Because of the discrepancies in the readings of the MRIs and CT scans, the ideal would be to assimilate all the studies and have them presented to an independent neuroradiologist," for an interpretation of whether the changes reflected on these studies were traumatic or degenerative.

When the Office did not receive a release form from appellant in the time allotted to obtain these studies from her physicians, it sent another letter to Dr. Swearingen asking whether the review of the films by a neuroradiologist was necessary. This was a proper attempt to clarify the opinion contained in Dr. Swearingen's initial report.

In a supplemental report dated July 23, 1997, Dr. Swearingen stated that it was not necessary to obtain a reading of the various studies by a neuroradiologist, as the clinical examination "remains the best criteria" and "stands on its own." As he did in his initial report, Dr. Swearingen concluded: "In summary, [appellant] does not have any current disability residuals or physical limitations as a result of the employment injury of April 20, 1988." He based this conclusion on his examination of appellant on June 10, 1997 and noted that there were strong indications of symptom magnification on that examination. The report of Dr. Swearingen, as that of an impartial medical specialist resolving a conflict of medical opinion, constitutes the weight of the medical evidence in this case and establishes that appellant's disability causally related to her April 20, 1988 employment injury ended by July 20, 1997.

² *James P. Roberts*, 31 ECAB 1010 (1980).

³ *Harold Travis*, 30 ECAB 1071 (1979).

⁴ 5 U.S.C. § 8123(a) states 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."

The May 25, 1999 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
June 27, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member