

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANTOINETTE POWELL and U.S. POSTAL SERVICE,
MORGAN GENERAL MAIL FACILITY, New York, NY

*Docket No. 00-1863; Submitted on the Record;
Issued May 24, 2001*

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

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

This is the second appeal before the Board in this case.¹ Previously, the Board reversed a September 5, 1995 decision, terminating appellant's compensation, finding that there was an unresolved conflict of medical opinion evidence. The Board, therefore, concluded that the Office failed to meet its burden of proof in terminating appellant's compensation. The law and facts of the case as set forth in the Board's prior decision are incorporated by reference.

On February 17, 1998 the Office referred appellant, an amended statement of accepted facts and the medical record to Dr. Barry S. Gloger, a Board-certified orthopedic surgeon, to resolve the conflict of medical opinion between Dr. Apostolos P. Tambakis, and Dr. Jack Levine, both Board-certified orthopedic surgeons.

In a February 27, 1998 report, Dr. Gloger provided a history of injury² and treatment and reviewed the medical record. On examination, he noted a full range of motion of the right knee, no redness, warmth, effusion, crepitus or instability, normal patellar tracking, negative McMurray, Apley, Lachman, Slocum, pivot shift and drawer signs and no tenderness to palpation to any aspect of the knee. Regarding the low back, Dr. Gloger found "no tenderness to palpation of the dorsal spinous processes, paravertebral muscles, iliac crest, sciatic notch, piriformis fossa, SI [sacroiliac] joints, [or the] greater trochanter." Straight leg raising testing was negative in both the sitting and supine positions and that there was no neurologic or motor abnormality of the lower extremities.

¹ Docket No. 96-03371 (December 1, 1997).

² On December 1, 1988 appellant tripped on a plastic mailing band at work and fell on the concrete floor, injuring her right knee.

Dr. Gloger diagnosed “[k]nee sprain, resolved and “[m]alingerer.” He noted that, during the examination, appellant “moved, rolled over, bent, squatted, jumped with total ease. Thus, there [was] no evidence of her accepted condition nor of active and continuing disabling residuals.” He concluded that appellant was fit for full duty without restrictions, that she could “sit for long periods of time,” “stand, walk, carry, load, bag and wrap” and “perform all the functions of a letter sorting machine operator.”

In support of her claim for continuing disability, appellant submitted reports from Dr. Surendranath K. Reddy, an attending Board-certified orthopedic surgeon. In periodic reports from January 9 to October 16, 1998, Dr. Reddy noted findings of an L4-5 disc bulge, degenerative disc disease at L5-S1 and a right knee sprain attributable to the December 1, 1988 accident. Dr. Reddy found appellant totally disabled for work and prescribed a narcotic analgesic. In April 23 and May 17, 1999 reports, Dr. Reddy found limited lumbar motion, “pain over the lower lumbar spine with radiation of pain into the paralumbar musculature and ... the extremity,” opined she was “totally disabled” and prescribed medication.

By notice dated May 25, 1999, the Office proposed to terminate appellant’s compensation on the grounds that the residuals of her accepted lumbar and right knee sprains had ceased. The Office advised appellant that she had 30 days in which to submit additional evidence or argument regarding the proposed termination of compensation.³

In a July 26, 1999 report, Dr. Reddy noted appellant’s continuing complaints of lumbar pain with radiculopathy, limited lumbar motion, an electromyographic (EMG) study “positive for lumbar radiculopathy” and a magnetic resonance imaging (MRI) scan demonstrating a bulging lumbar disc.

By decision dated September 3, 1999, the Office terminated appellant’s compensation effective September 11, 1999, on the grounds that any work-related disability due to the accepted December 1, 1988 injuries had ceased, based on Dr. Gloger’s February 27, 1998 report.

In an October 18, 1999 report, received by the Office on November 2, 1999, Dr. Reddy provided a history of injury and treatment and reviewed the medical record, noting that July 1989 diagnostic tests showed an L5-S1 disc bulge and L4-5 radiculopathy. A September 18, 1999 MRI showed a “degenerated desiccated L5-S1 intravertebral disc with radial tear posterior aspect of the annulus fibrosis indicating early herniation without evidence of protrusion.”

In an October 8, 1999 examination, appellant continued to complain of lower lumbar pain radiating into the right leg and had restricted range of lumbar motion and a positive straight leg raising test on the right at 70 degrees. Dr. Reddy diagnosed a herniated L5-S1 disc with “right radiculopathy.” He opined that, “with a reasonable degree of medical certainty, based upon the patient’s history and review of records, the injury sustained by [appellant] to her lumbar spine can be attributed to the accident dated, December 1, 1988.” Noting appellant’s chronic low back

³ In a June 18, 1999 letter, appellant requested an extension of the 30-day period in which to submit additional evidence as Dr. Reddy was presently unable to submit a report.

pain over the previous 10 years, the positive July 1989 and September 20, 1999 MRIs and positive July 1989 EMG testing, Dr. Reddy opined that appellant was “permanently disabled.”

Appellant disagreed with the September 3, 1999 decision and in a November 22, 1999 letter requested reconsideration. By decision dated January 7, 2000, the Office denied reconsideration on the grounds that appellant’s request was insufficient to warrant merit review.

Appellant again requested reconsideration and enclosed a copy of Dr. Reddy’s October 18, 1999 report. By decision dated February 7, 2000, the Office vacated the January 7, 2000 decision and denied modification of the September 3, 1999 decision. The Office found that it had failed to consider Dr. Reddy’s October 18, 1999 report, which was received by the Office prior to appellant’s November 22, 1999 request for reconsideration. However, the Office further found that Dr. Reddy’s report was speculative and insufficiently rationalized and that Dr. Gloger’s report continued to represent the weight of the medical evidence.

The Board finds that the Office met its burden of proof to terminate appellant’s compensation benefits.

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination or modification of compensation benefits.⁴ The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁵ The Office’s burden includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁶

After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that he had an employment-related disability, which continued after termination of compensation benefits.⁷

In this case, Dr. Levine, a Board-certified orthopedic surgeon and second opinion physician, opined that appellant had no objective residuals of the accepted December 1, 1988 lumbar and right knee sprains. Dr. Tambakis, an attending Board-certified orthopedic surgeon, stated that appellant had disabling lumbar pathologies due to the accepted injuries. Thus, there was a conflict of medical opinion.

Where there exist a conflict of medical opinion, the case is referred to an impartial medical specialist for the purpose of resolving the conflict. If the opinion of the impartial

⁴ *Raymond W. Behrens*, 50 ECAB ____ (Docket No. 97-1289, issued January 14, 1999).

⁵ *Carl D. Johnson*, 46 ECAB 804, 809 (1995).

⁶ *Raymond W. Behrens*, *supra* note 4.

⁷ *Talmadge Miller*, 47 ECAB 673, 679 (1996); *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

medical specialist is sufficiently well rationalized and based upon a proper factual background, it must be given special weight.⁸

Pursuant to section 8123(a) of the Federal Employees' Compensation Act,⁹ the Office referred appellant to a third physician for an impartial medical examination.¹⁰ Dr. Gloger provided an accurate and comprehensive review of appellant's medical history and performed a thorough orthopedic examination. Based on this review and examination, he found no objective evidence of any disability. Specifically, he found no evidence of any lumbar or right knee abnormalities, noting that appellant was able to perform all requested maneuvers, including bending, jumping and squatting, with no difficulty. Dr. Gloger concluded that appellant had fully recovered from her work injuries and was capable of resuming her duties as a letter sorting machine operator.

The Board finds that Dr. Gloger's opinion is well rationalized, based on a meticulous and thorough clinical examination and relies on a complete medical and factual background. Therefore, his opinion must be accorded special weight on the issue of whether appellant had any residuals or disability resulting from the accepted lumbar and right knee sprains as the result of the December 1, 1988 employment injury. As the weight of the medical opinion evidence on this issue, Dr. Gloger's report justifies the Office's termination of appellant's compensation benefits effective September 11, 1999. The burden of proof, thereafter, shifts to appellant.

In his October 18, 1999 report, Dr. Reddy noted restricted lumbar motion, low back pain and a positive straight leg raising test and diagnosed an L5-S1 disc herniation with L4-5 radiculopathy. Dr. Reddy opined that, "with a reasonable degree of medical certainty, based upon the patient's history and review of the records," that appellant's lumbar condition and "permanent" disability could "be attributed to the accident dated December 1, 1988."

The Board finds that Dr. Reddy's report is insufficient to establish appellant's claim of continuing disability on and after September 11, 1999. He did not provide any findings regarding appellant's right knee. Also, Dr. Reddy did not explain how and why the December 1, 1988 lumbar sprain would cause appellant's claimed continuing disability for work, or how that incident would have caused the diagnosed herniated L5-S1 disc and L4-5 radiculopathy. Without such medical rationale addressing the crucial issue of causal relationship, his report is of greatly diminished probative value.¹¹

⁸ *Irene M. Williams*, 47 ECAB 619, 622 (1996); *Roger Dingess*, 47 ECAB 123, 126 (1995); *Carl Epstein*, 38 ECAB 539 (1987).

⁹ 5 U.S.C. § 8101 *et seq.*

¹⁰ Section § 8123(a) of the Act provides that, "[I]f there is disagreement between the physician making the examination for the United States and the physician for employee, the Secretary shall appoint a third physician who shall make an examination." 5 U.S.C. § 8123(a).

¹¹ *Lucrecia M. Nielsen*, 42 ECAB 583 (1991).

Consequently, appellant has not established that her condition on and after September 11, 1999 was causally related to her accepted lumbar and right knee sprains sustained on December 1, 1988.

The February 7, 2000 and September 3, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
May 24, 2001

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member