U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SANDRA LEE and U.S. POSTAL SERVICE,
CENTRALIZED PARCEL POST FACILITY, New York, NY

Docket No. 00-2303; Submitted on the Record;
Issued April 12, 2002

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 February 18, 1992 appellant, then a 31-year-old distribution clerk, sustained an employment-related lumbosacral sprain. She stopped work that day and returned to limited duty on March 25, 1992.[1] Appellant subsequently sustained recurrences of disability on March 26, May 27 and July 10, 1992. She moved from the New York City area to Rochester, New York in September 1992 and underwent a back-strengthening program at the University of Rochester.[2] Appellant returned to limited duty, four hours a day on July 16, 1993 when she worked two and one-half hours. She has not worked since.

The Office continued to develop the claim[3] and on May 18, 1999 referred appellant, along with the medical record, a set of questions and the statement of accepted facts to Dr. E. Robert Wilson, a Board-certified orthopedic surgeon, for a second opinion evaluation. Based on his opinion, by letter dated July 23, 1999, the Office proposed to terminate appellant's compensation benefits. In an August 19, 1999 letter, appellant disagreed with the proposed

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[1] The record indicates that, when appellant returned to work following the initial employment injury, she had transferred to the Church Street Station in New York City.

[2] The record also indicates that appellant was discharged from this program due to repeated absences.

[3] The record further indicates that in 1994 the Office found that a conflict in medical opinion existed between the opinions of appellant's treating orthopedic surgeon, Dr. Ernesto Lee and a second opinion examiner, Dr. Howard E. Finklestein, a Board-certified orthopedic surgeon. In reports dated March 21 and 22, 1994, Dr. Robert D Dickerson, a Board-certified orthopedic surgeon, who performed an independent medical evaluation for the Office, advised that appellant was totally disabled. In April 1996, the Office referred appellant to Dr. Lawrence Cohen, a Board-certified orthopedic surgeon, for a second-opinion evaluation. He advised that appellant could work four hours a day with restrictions. Dr. Lee also advised that appellant could work with restrictions. Appellant then came under the care of Dr. Richard C. Dobson, a Board-certified physiatrist.

termination and submitted a report dated August 5, 1999 from Dr. Dobson. In an August 27, 1999 decision, the Office terminated appellant's compensation, effective September 11, 1999, finding that the weight of the medical evidence rested with the opinion of Dr. Wilson.

On September 23, 1999 appellant, through her representative, requested a hearing that was scheduled for January 10, 2000. Appellant did not appear at the hearing for medical reasons and requested that the Branch of Hearings and Review conduct a review of the written record.

By decision dated April 6, 2000, an Office hearing representative affirmed the prior decision. The instant appeal follows.

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation. After it has determined that an employee has disability causally related to his or her employment, the Office may not terminate compensation without establishing that the disability has ceased or that it was no longer related to the employment.[4]

The relevant medical evidence includes a June 3, 1999 report in which Dr Wilson, who provided a second opinion evaluation for the Office, advised that appellant had no objective evidence of lumbosacral sprain or any objective findings to support any continued disability due to the February 18, 1992 employment injury. He opined that she could perform the full duties of her date-of-injury position. In a work capacity evaluation dated June 5, 1999, Dr. Wilson advised that appellant had no disability and provided no restriction to her physical activity.

Appellant's treating Board-certified physiatrist, Dr. Dobson, provided numerous reports and was consistent in his opinion that she continued to be totally disabled. In a report dated August 5, 1999, he disagreed with Dr. Wilson's findings and advised that appellant continued to be totally disabled due to her back injury. Dr. Dobson stated:

> "Dr. Wilson's exam[ination] is simply inadequate for assessing [appellant's] ability to perform the duties of a mail clerk. I believe my records, taken in their entirety, with multiple repeated evaluation of [her] history and my examination findings, combined with the objective measurements from the University of Rochester and other physician examination[s], provide clear and reasoned evidence that [appellant] does have significant functional limitations."

An August 31, 1999 magnetic resonance imaging (MRI) of the lumbar spine revealed diffuse circumferential bulging of the annuli at the L3-4 and L4-5 levels with a broad-based, shallow central disc protrusion at both levels which created a minimal extradural impression on the thecal sac.

When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial specialist, pursuant to section 8123(a) of the Federal Employees'

[4] *See Patricia A. Keller*, 45 ECAB 278 (1993).

Compensation Act,[5] to resolve the conflict in the medical opinion. In this case, although, Dr. Wilson, the Office referral physician, offered an opinion that appellant's employment-related back condition had ceased, Dr. Dobson, appellant's treating physician, continued to diagnose an employment-related back condition that rendered her totally disabled. The Office terminated appellant's compensation benefits on the grounds that her employment-related injury had ceased. The Board finds that, in light of the positive MRI findings,[6] the reports of Drs. Dobson and Wilson, who are both Board-certified physicians, are of approximately equal value and are in conflict on the issue of whether appellant continued to be totally disabled due to the February 18, 1992 employment injury.[7] Consequently, the Office did not meet its burden of proof in terminating appellant's compensation.[8]

[5] 5 U.S.C. § 8123(a).

[6] The Board notes that the MRI was not available to Dr. Wilson at the time of his second opinion evaluation.

[7] Appellant further contends that Dr. Wilson was biased against appellant because he had treated her domestic partner, Pedro Linares. Section 8123(a) of the Act authorizes the Office to require an employee who claims compensation for an employment injury to undergo such physical examinations as it deems necessary. *Eva M. Morgan*, 47 ECAB 400 (1996). The procedures for selecting a physician to perform a second opinion examination do not preclude medical specialists who may have previously ministered to a claimant or performed a fitness-for-duty evaluation for a federal agency other than the employing establishment. *John Watkins*, 47 ECAB 597 (1996). Furthermore, the determination of the need for an examination, the type of examination, the choice of locale and the choice of medical examiners are matters within the province and discretion of the Office. The only limitation on this authority is that of reasonableness. *Id.* The Board thus finds that the Office did not err in selecting Dr. Wilson as the second opinion examiner.

[8] *See Gail D. Painton*, 41 ECAB 492 (1990). To resolve this conflict, the Office should have referred the case record, including all test results and a statement of accepted facts to a Board-certified specialist for resolution of the conflict. It is further noted that appellant was involved in a nonwork-related motor vehicle accident on February 13, 1999. Both Dr. Dobson and Dr. Wilson discussed this in their reports.

The decision of the Office of Workers' Compensation Programs dated April 6, 2000 is hereby reversed.

Dated, Washington, DC
April 12, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member