

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARGARET R. FRIEDMAN and U.S. POSTAL SERVICE,
POST OFFICE, Winnetica, IL

*Docket No. 00-2745; Submitted on the Record;
Issued April 15, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits effective August 2, 2000.

Appellant, a 49-year-old distribution clerk, filed a notice of traumatic injury on November 5, 1991 alleging that on October 8, 1991 she injured her back in the performance of duty. She filed a second claim on May 29, 1992 for injury on November 19, 1991. The Office accepted appellant's claim for low back strain, herniated disc L5-S1 with left leg radiculopathy, thoracic subluxation and laminectomy L5-S1.¹ The Office entered appellant on the periodic rolls on December 26, 1996.

By letter dated March 2, 1999, the Office proposed to terminate appellant's compensation benefits. The Office terminated appellant's compensation benefits by decision dated April 6, 1999. Appellant requested an oral hearing. By decision dated December 9, 1999, the hearing representative remanded the case to the Office for changes to the statement of accepted facts and additional medical development.

Following the hearing representative's decision, the Office undertook further development and terminated appellant's compensation benefits by decision dated August 2, 2000.

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

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.²

¹ Appellant alleges that she also sustained a herniated disc at L4-5. However, there is no evidence in the record that the Office accepted this additional condition.

² *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

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.³ Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁴ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.⁵

Appellant's attending physician, Dr. David E. Shapiro, a Board-certified orthopedic surgeon, completed a report on June 12, 1997 and indicated that appellant could work only five hours a day. He stated, "I believe this is related to the previous injury at L4-5 and not to the disc herniation at L5-S1."

The Office referred appellant for a second opinion evaluation with Dr. Avi Bernstein, a Board-certified orthopedic surgeon. In a report dated June 26, 1997, Dr. Bernstein diagnosed chronic complaints of low back pain related to a degenerative condition of the lumbar spine. He stated, "With respect to causation, it appears to me that this patient suffers from a chronic degenerative condition of her lumbar spine. I do not feel that her subsequent disc herniation of September of 1996 and symptoms of incapacitating sciatica, can be causally related to the [October 8, 1991] injury, but rather to a chronic degenerative condition."

The Office found a conflict of medical opinion evidence regarding the causal relationship between appellant's current condition and her accepted employment injury. Section 8123(a) of the Federal Employees' Compensation Act,⁶ provides, "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 Office referred appellant to Dr. Michael Kornblatt, a Board-certified orthopedic surgeon, to resolve the conflict. In a report dated October 13, 1997, Dr. Kornblatt examined appellant and diagnosed degenerative disc disease. He stated that this condition was not work related and that appellant's work restrictions and further treatment were due to the degenerative disc disease rather than her work-related injuries. The Office requested a supplemental report on October 29, 1997. In a report dated November 3, 1997, Dr. Kornblatt stated that appellant's work-related injuries occurring in 1991 and 1996, aggravated her preexisting degenerative condition and that this aggravation was temporary. He concluded that the aggravation resolved within three to four months following the injury.

³ *Id.*

⁴ *Furman G. Peake*, 41 ECAB 361, 364 (1990).

⁵ *Id.*

⁶ 5 U.S.C. § 8123(a).

In a report dated March 26, 1999, Dr. Shapiro stated that he had reviewed appellant's records and concluded that appellant's initial employment injury resulted in a herniated disc at L4-5. Dr. Shapiro stated that she later developed a herniated disc at L5-S1 which he treated with a laminectomy. He concluded:

"I believe that you had two injuries. The first was the injury of 1991, resulting in the degenerated and injured disc at L4-5. This is based on the [magnetic resonance imaging scan] and discogram done at that time. The second and I believe unrelated injury, was the herniated disc at L5-S1, from which you had an uneventful recovery."

Dr. Shapiro submitted additional reports dated August 30 and September 9, 1999. He concluded that appellant's current degenerative disc disease was aggravated by her 1991 employment injury and that this aggravation is a permanent condition.

The hearing representative found that Dr. Kornblatt's report was not sufficiently well rationalized to carry the weight of the medical evidence as an impartial medical examiner and remanded the case to the Office for another impartial examination.

The Office referred appellant, an amended statement of accepted facts and list of specific questions to Dr. Mark Aschliman, a Board-certified orthopedic surgeon, to resolve the conflict of medical opinion evidence. In a report dated August 1, 2000, Dr. Aschliman reviewed appellant's history of injury and medical history. He performed a physical examination and diagnosed degenerative lumbosacral spondylosis. Dr. Aschliman stated, "This is a progressive degenerative process and has not been caused directly by the industrial activities of the examinee, or specifically by October 8 or November 19, 1991 industrial occurrences." He found that the initial findings in 1991 were consistent with a significant degenerative process of the lumbosacral spine and a temporary aggravation of this clearly preexisting condition. Dr. Aschliman stated that appellant's discomfort was a manifestation of her underlying condition with no structural damage or permanent injury being sustained as a result of the examinee's work activities." He provided work restrictions and stated that the restrictions were not warranted as a result of any industrial activity, event or occurrence but rather the restrictions related to the underlying physical constitution of appellant.

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.⁷ In this case, Dr. Aschliman provided a detailed report explaining that based on examination of appellant and her diagnostic studies he believed that she had a temporary aggravation of an underlying condition which had ceased. This report is sufficient to establish that appellant's current condition and disability for work are due to her underlying degenerative condition rather than to the accepted work injuries. Therefore, the Board finds that the Office met its burden of proof to terminate appellant's compensation and medical benefits.

⁷ *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

The August 2, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
April 15, 2002

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member