

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LAVINIA L. DUNKIN and U.S. POSTAL SERVICE,
POST OFFICE, Tampa, FL

*Docket No. 02-1030; Submitted on the Record;
Issued December 9, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective July 15, 2001.

On December 24, 1991 appellant, then a 47-year-old mail processor, filed a notice of traumatic injury and claim for compensation, alleging that she tripped on catalogs on the floor and hurt her lower back, spine and neck. The Office accepted appellant's claim for a cervical and lumbar strain. After a period of disability appellant returned to work, but stopped again in October 1993. All appropriate benefits were authorized and paid.

In numerous reports appellant's treating physician, Dr. David Sikes, a Board-certified internist, opined that appellant had ongoing pain related to her work-related injury of December 24, 1991 and was totally and permanently disabled as a result of the back pain. Although appellant had underlying degenerative disease of her lumbar spine, Dr. Sikes stated that was well controlled prior to her injury.

The Office referred appellant, together with the medical reports of file and a statement of accepted facts, to Dr. Chris Tountas, a Board-certified orthopedic surgeon, for a second opinion. In a report dated March 22, 2000, Dr. Tountas related appellant's history, symptoms and findings on examination and, after reviewing the medical records and objective tests, stated that his overall impression was that there is a sacralization of L5 and appellant does not have all five fully developed lumbar vertebrae. He stated that whether appellant's changes are purely osteoarthritic or degenerative was difficult to sort out, but opined that all changes relative to the cervical and lumbosacral spine were preexistent. Dr. Tountas diagnosed degenerative arthritis cervical and lumbosacral spines with congenital anomaly lumbosacral spine and stated all degenerative changes were preexistent. He opined that appellant's work-related injuries had resolved and her present condition was due to the progression of her degenerative changes, which are not due to the work-related injury. Dr. Tountas noted that the Office indicated that appellant had an injury in 1999. He stated that this might be the 1991 injury and indicated that any history or

documentation for a subsequent injury may have an effect on appellant's condition, but he opined that it was more likely due to the progressive degenerative changes. Dr. Tountas opined that the diagnosis attributed to work injury was a low back strain with a temporary aggravation of the preexisting arthritic or degenerative changes of the cervical and lumbosacral spine. He opined that all the ongoing symptoms were due to the degenerative changes and not the initial lumbar and cervical strain. Dr. Tountas stated that maximum medical improvement had been obtained and previously assessed in 1998. He opined that appellant was capable of performing the physical requirements of her former job as a mail processor and did not feel that there were any further recommendations for further treatment.

On August 15, 2000 the Office proposed to terminate appellant's compensation benefits. By decision dated September 18, 2000, the Office terminated appellant's compensation effective October 8, 2000, on the basis that appellant had no further residuals of her December 24, 1991 injury.

Appellant disagreed with the Office's decision and requested a hearing. In a decision dated January 16, 2001, an Office hearing representative determined there was an unresolved conflict in medical opinion at the time the Office terminated benefits. Accordingly, the September 18, 2000¹ decision was reversed and the case remanded for the selection of an impartial medical specialist to resolve the medical conflict.

Dr. Sikes continued to report evidence of disability and attribute appellant's symptoms to her work-related injury.

On March 9, 2001 the Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Walter I. Choung, a Board-certified orthopedic surgeon, for an impartial medical opinion resolving a conflict between Drs. Sikes and Tountas on the issue of continuing disability.

In a report dated March 29, 2001, Dr. Choung related appellant's history. He described his findings on examination and summarized certain medical records. Dr. Choung diagnosed degenerative joint disease of the cervical spine and of the lumbar spine, history of soft tissue injuries to the cervical spine and lumbar spine, persistent pain in the lumbar spine with radicular symptoms in the right leg and significant deconditioning due to disuse over the years. Responding to questions posed by the Office, he opined that the work-related injuries had resolved. Dr. Choung stated that review of the record revealed that appellant had preexisting degenerative joint disease of the lumbar spine. He noted that it also had been established by several physicians that appellant had aggravation of degenerative joint disease. Dr. Choung noted that the injuries of December 24, 1991 were to soft tissues and opined that such soft tissue injuries sustained in the work-related accident had resolved at this point. He rationalized that one would not expect a cervical or lumbar sprain to continue to be manifested in such severe pain for so many years. Dr. Choung opined that appellant's pain and limitation were related to

¹ Although the Office hearing representative referenced the date of the decision to be August 15, 2000, the Board notes that this refers to the date of the Office's proposed termination, which the Office finalized in its decision of September 18, 2000.

her degenerative joint disease and disuse. Appellant was noted to have never regained full strength and range of motion. Dr. Choung stated that the return of function is normally expected from fairly minor soft tissue injuries. He further opined that much of appellant's current complaints are related to the degenerative joint disease of the lumbar spine. Dr. Choung advised that, if appellant sustained another injury in 1999, this certainly would have an effect on the cervical and lumbar spine as any soft tissue injuries at any point would aggravate the situation. However, he stated that much of the present situation seemed to be related to the degenerative joint disease. Dr. Choung opined that appellant would be unable to return to her prior occupation as a mail processor due to the fact that she was currently extremely deconditioned and had very limited strength and range of motion. He further opined that appellant would not be able to return to her former occupation on a full-time basis. Dr. Choung opined that appellant would be able to work in another job, which did not require significant physical exertion. He further opined that appellant has already reached maximum medical improvement. Dr. Choung stated that, if appellant chooses to try to return to the work force, she may benefit from aggressive physical therapy with emphasis on range of motion and strengthening. If she chooses to improve her symptoms, appellant may undergo lumbar epidural steroid injections, which may improve her symptoms enough to allow appellant to return to work on a limited basis. If she chooses not to pursue these measures, then no significant change in her status from her current situation would be anticipated.

On May 7, 2001 the Office notified appellant that it proposed to terminate her compensation benefits. The Office found that Dr. Choung's opinion represented the weight of the medical evidence and established that appellant had no continuing employment-related disability as a result of the December 24, 1991 injury.

In response to the Office's proposed termination, appellant submitted her disagreement in a letter dated May 18, 2001. By decision dated June 27, 2001, the Office terminated appellant's compensation benefits effective July 15, 2001.

Appellant disagreed with the above decision and requested a hearing before an Office representative. At the December 14, 2001 hearing, she also submitted a statement outlining her disagreement and submitted additional medical evidence.

In a December 12, 2001 report, Dr. Frank Fusco, a Board-certified family practitioner, related that appellant has been suffering from upper and lower back pain due to arthritis and an injury in 1991. Dr. Fusco requested that the Office authorize payment for a pain medication.

In a December 14, 2001 report, Dr. Thomas Lafferty, a Board-certified internist specializing in rheumatology, advised that he has seen appellant twice, on March 9 and December 14, 2001. He related appellant's history of injury and opined that he could not state whether her arthritis was worse after the injury without having x-rays to compare before and after the injury. Dr. Lafferty stated that sometimes arthritis can be aggravated by injury.

In a report dated December 31, 2001, Dr. Sikes wrote that there has been some confusion as to whether appellant's entire condition was due to lumbar strain or osteoarthritis. He opined that appellant had preexisting degenerative disease (osteoarthritis) of her lumbar spine. She then suffered an injury while working for the postal service December 24, 1991 and has had pain

since that time. Dr. Sikes opined that the injury of December 24, 1991, exacerbated her osteoarthritis which has never improved since that time. He further noted that appellant had advanced degenerative disease by x-ray dated August 17, 1999. Dr. Sikes further opined that, if appellant did not have her injury of December 24, 1991, she would not have the degree of pain that she currently has. He opined that the amount of pain and arthritis appellant has in her back causes appellant to be totally and permanently disabled.

By decision dated February 21, 2002, (not marked but submitted with the appeal), an Office hearing representative affirmed the Office's June 27, 2001 termination of compensation benefits. The hearing representative found that the report of Dr. Choung represented the weight of the medical evidence.

The Board finds that the Office improperly terminated compensation benefits for the accepted conditions of lumbar and cervical strain effective July 15, 2001, the date compensation benefits were terminated.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.² 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 The Office's procedure manual provides that, having accepted a claim and initiated payments, the Office may not terminate compensation without a positive demonstration, by the weight of evidence, that entitlement to benefits has ceased.⁴ The inadequacy or absence of a report in support of continuing benefits is not sufficient to support termination and benefits should not be suspended for that reason.⁵

When there exist 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 upon a proper factual background, must be given special weight.⁶

The Office accepted that appellant sustained cervical and lumbar strains on December 24, 1991 while in the performance of her duties. From the record it appears that appellant has preexisting conditions of cervical and lumbar degenerative disc disease and/or osteoarthritis of the cervical and lumbar spine. To resolve a conflict between appellant's attending physician, Dr. Sikes and the Office referral physician, Dr. Tountas, on the issue of continuing disability, the

² *Harold S. McGough*, 36 ECAB 332 (1984).

³ *Patricia A. Keller*, 45 ECAB 278 (1993); *Regina C. Burke*, 43 ECAB 399 (1992); *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.3 (July 1993).

⁵ *Id.*, Chapter 2.812.7(c)(1).

⁶ *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

Office referred appellant, together with the case record and a statement of accepted facts to Dr. Choung, a Board-certified orthopedic surgeon, for an impartial medical opinion.

In his March 29, 2001 report, Dr. Choung related appellant's history, described his findings on examination and summarized certain medical records. He opined that there were no findings of cervical or lumbar strain occurring on December 24, 1991. Dr. Choung stated that the cervical and lumbar strain sustained in the work-related accident of 1991 had resolved as one would not expect a cervical or lumbar sprain to continue to be manifested in such severe pain for so many years. He opined that appellant had preexisting underlying degenerative joint disease and that appellant's pain and limitation were related to her underlying degenerative joint disease. However, he did not address whether the work-related accident of 1991 had materially aggravated such preexisting conditions and whether such aggravation was temporary or permanent. Although Dr. Choung reported that appellant could work in a modified position and had reached maximum medical improvement, he then contradicted himself by stating that she was extremely deconditioned and could only return to work after she pursued an active and aggressive physical therapy program to improve her symptoms enough to enable her to return to work on a limited basis. Dr. Choung's report raises many questions concerning whether appellant's work-related disability had ceased and the basis upon which she would be able to return to a modified position.

When the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from the 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. When the impartial medical specialist's statement of clarification or elaboration is not forthcoming or if the specialist is unable to clarify or elaborate on the original report or if the specialist's supplemental report is also vague, speculative or lacks rationale, the Office must submit the case record together with a detailed statement of accepted facts to a second impartial specialist for a rationalized medical opinion on the issue in question.⁷ Unless this procedure is carried out by the Office, the intent of 5 U.S.C. § 8123(a) will be circumvented when the impartial medical specialist's report is insufficient to resolve the conflict of medical evidence.⁸

The report of Dr. Choung fails to satisfy the Office's burden of proof and thus the Office improperly terminated appellant's benefits.

The February 21, 2002 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, DC
December 9, 2002

⁷ See *Nathan L. Harrell*, 41 ECAB 402 (1990).

⁸ *Harold Travis*, 30 ECAB 1071 (1979).

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member