

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GERALDINE V. PIZZA and U.S. POSTAL SERVICE,
POST OFFICE, Southeastern, PA

*Docket No. 01-1303; Submitted on the Record;
Issued January 25, 2002*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's entitlement to compensation benefits effective December 28, 1998 on the grounds that residuals of the employment injury had ceased.

On November 17, 1997 appellant, then a 36-year-old postal clerk slipped on leaves in the parking lot of the employing establishment and jolted her body. The claim was accepted for lumbar strain. Appellant immediately stopped work and received appropriate compensation. She returned to limited duty for four hours per day on January 12, 1998.

Appellant initially received evaluation and treatment for her injury on November 21, 1997 from the Lansdale Medical Group and began physical therapy shortly thereafter. She continued treatment with Dr. Charles Kish, an osteopath and physician of the group. On December 9, 1997 the Office referred appellant to Dr. Harvey Bishow, a Board-certified orthopedic surgeon, for a fitness-for-duty examination.

In a December 17, 1997 report, Dr. Bishow reviewed appellant's history of injury and noted that on November 17, 1997 in an effort to prevent a fall in the employing establishment parking lot, appellant twisted her right knee and felt like she jammed her spine. He stated that appellant described low back pain, pain in the left leg radiating to the left calf with numbness and tingling in both legs and problems with her right knee. Dr. Bishow noted that appellant stated a prior history of problems with the right knee; however, they eventually resolved. He indicated that appellant denied any previous back problems although a 1993 medical note of record indicated that appellant had been treated for a chronic low back condition and as a result, was disabled from work for approximately a week. Dr. Bishow reviewed radiographic reports, noted his findings on examination and opined that appellant sustained a lumbar strain, superimposed on preexisting lumbar degenerative disease. He further indicated that he expected her condition to resolve within six weeks of the injury and at that time was cleared for work within imposed restrictions.

In an attending physician's report dated March 3, 1998, Dr. Kish indicated that appellant had persistent low back pain and possible disc herniation and should continue working only light duty for four hours per day. As of September 28, 1998, appellant continued to work the imposed restrictions but increased her hours to six hours per day. She received compensation through August 9, 1998, beyond the date her condition would reportedly resolve.

The Office subsequently referred appellant for an independent medical examination with Dr. Steven Valentino, an osteopath to determine the extent and nature of the November 17, 1997 work injury. He discussed appellant's medical records, employment history, preexisting injuries and current complaints of low back pain and intermittent chronic right knee pain. Dr. Valentino outlined his findings on physical examination and concluded that appellant's lumbar strain had resolved. He stated that his examination revealed that appellant had fully, totally and completely recovered from her work-related lumbar strain of November 17, 1997 without residual or need for ongoing supervised medical care of any type or variety. Dr. Valentino noted, however, that due to unrelated conditions including morbid obesity, history of right knee pain and nonoccupational-related lumbar degenerative changes found on x-ray, appellant should remain in a light-duty position.

On November 4, 1998 the Office proposed to terminate compensation benefits for the reason that the effects of the November 17, 1997 work injury had ceased. In response appellant submitted medical evidence and argument that she was only capable of part-time limited duty due to her work injury.

By decision dated December 28, 1998, the Office terminated appellant's entitlement to continuing compensation for wage loss and medical benefits effective December 23, 1998, on the grounds that appellant had recovered from the effects of the November 17, 1997 work injury. On January 13, 1999 appellant through counsel requested an oral hearing and submitted additional evidence.

Appellant's counsel submitted treatment notes and narrative reports, including a report from Dr. Bruce Menkowitz, a Board-certified orthopedic surgeon, dated December 1, 1998. In his report, Dr. Menkowitz reviewed appellant's case history, including the facts of the employment injury, her medical records and his findings on examination. He found that appellant had some pain on examination and that x-rays revealed degenerative changes with anterior body spurring. Dr. Menkowitz diagnosed chronic lumbosacral strain with sciatic nerve root irritation and early degenerative disc disease. He further stated:

"I feel [appellant] has suffered a strain of the paraspinal muscles and soft tissue supportive structures in the low back. My major concern is that she has suffered changes in the intervertebral discs. Unfortunately due to her size, MRI [magnetic resonance imaging scan] and CT [computerized tomography] scan is not a viable option. I feel she will require continued modification of her work schedule as well as other conservative modalities to resolve her problem. I feel her present pain pattern is related to her injury at work in November 1997."

In a January 13, 1999 report, Dr. Kish stated that appellant was seen on January 8, 1999 for exacerbation of low back pain. He recommended that she work six hours of restricted duty per day.

In a November 1, 1999 updated report, Dr. Menkowitz noted his previous findings and that appellant continued to have pain in her low back since his evaluation in April 1999 and that appellant's prognosis for returning to her preinjury work was poor. He indicated that appellant was capable of sedentary work, six hours per day.

Following a hearing held July 30, 1999, an Office hearing representative set aside the prior termination decision and remanded the case back to the Office for further development. He determined that based upon the evidence, appellant's testimony and the November 1, 1999 report of Dr. Menkowitz, the case should be referred to an impartial specialist to resolve a conflict created by Drs. Menkowitz and Valentino as to whether appellant had any work residuals and related disability.

On February 17, 2000 the Office referred appellant to Dr. John Salvo, a Board-certified orthopedist in order to resolve the conflict. In a report dated March 15, 2000, Dr. Salvo reviewed a revised statement of accepted facts, including the history of injury, medical and radiological reports and his findings on examination. Dr. Salvo reported that appellant had full and synchronous and pain free range of motion of the cervical, thoracic and lumbosacral spine and normal range of motion of both lower extremities with no sensory impairment. He further indicated that he conducted various tests on examination, which appellant was able to perform without difficulty. Dr. Salvo stated:

“My conclusion is that [appellant] sustained a soft tissue injury to her lumbar spine and that she had preexisting degenerative joint disease and degenerative disc disease of the lumbar spine at the time of injury. There is no objective evidence to support the diagnosis of herniated disc or sciatic radiculopathy. She describes numbness in her legs after sitting and I believe that is pressure phenomenon.”

* * *

“Any current symptoms that she has reference to her back can be attributed to preexisting degenerative changes, possibly related to gout and to her size.

“[Appellant's] soft tissue injuries have healed and she has no impairments that are causally related to the injury of November 17, 1997. My opinion is that she can be returned to full-time work at her previous occupation.

“All of the above statements are [made] within a reasonable degree of medical certainty....”

By decision dated May 31, 2000, the Office terminated appellant's entitlement to wage-loss compensation and medical benefits based on the report of the impartial specialist concluding

that appellant had recovered from the November 17, 1997 work injury and could return to full-time work.

On June 2, 2000 appellant through counsel requested an oral hearing, which was held October 23, 2000. During the hearing, appellant's counsel argued that appellant could only tolerate her current light-duty work for six hours per day due to residuals of the November 17, 1997 work injury. He further argued that the Office had improper contact with Dr. Salvo and that he had anticipated that after the Office denied appellant's request for participation in selecting the impartial specialist, that it would issue a formal decision in that regard.

By decision dated January 16, 2001, an Office hearing representative found that the weight of the medical evidence remained with Dr. Salvo, the impartial specialist, who opined that appellant's current symptoms and work restrictions were unrelated to the November 17, 1997 work injury. The Office hearing representative further found that the arguments made by appellant's counsel at the hearing were without merit. The Office hearing representative therefore affirmed the prior termination decision.

The Board finds that the Office met its burden of proof in terminating appellant's compensation for her work-related lumbar strain.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.¹ 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.²

In this case, there was a conflict in the medical opinion evidence between Drs. Menkowitz and Valentino as to whether appellant had any work-related residuals and whether disability related to the accepted lumbar strain injury had ceased. Dr. Menkowitz indicated that appellant had continuing complaints of pain in her lower back region. He diagnosed chronic lumbosacral strain with sciatic nerve root irritation and opined that appellant was partially disabled from work and could only work limited duty, six hours per day. Conversely, Dr. Valentino found that appellant had completely recovered from the work-related lumbar strain of November 17, 1997 and had no residuals and continuing disability related to her accepted lumbar strain.

Section 8123(a) of the Federal Employees' Compensation Act provides that, "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."³

¹ *Harold McGough*, 36 ECAB 332 (1984).

² *Jason C. Armstrong*, 40 ECAB 907 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1929).

³ 5 U.S.C. § 8123.

Given the conflict in the medical evidence, the Office properly referred appellant to an impartial physician for a medical evaluation. Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently reasoned upon a proper factual background, must be given special weight.⁴

In a report dated March 15, 2000, Dr. Salvo opined that appellant had no physical or radiological signs to substantiate a claim of partial disability related to the November 17, 1997 injury and that her persistent symptoms were likely attributable to her size and degenerative disc disease.

The Board considers the report of Dr. Salvo to be thorough and well rationalized, supported by the normal objective evidence and based on accurate medical and factual history. The Board, therefore, finds Dr. Salvo's opinion entitled to special weight.

Consequently, because the report of Dr. Menkowitz was not sufficiently reasoned to overcome the opinion of the impartial medical specialist, the Board concludes that the Office met its burden of proof in terminating appellant's compensation benefits.

The decisions of the Office of Workers' Compensation Programs dated January 16, 2001 and May 31, 2000 are affirmed.

Dated, Washington, DC
January 25, 2002

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

⁴ *Roger Dingess*, 47 ECAB 123 (1995).