

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of KUM PARK and U.S. POSTAL SERVICE, SOUTHEASTERN PLANT &  
DISTRIBUTION CENTER, Southeastern, PA

*Docket No. 01-1939; Submitted on the Record;  
Issued January 25, 2002*

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DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,  
A. PETER KANJORSKI

The issue is whether appellant has established that she had any continuing disability or residuals after November 2, 2000, the date the Office of Workers' Compensation Programs terminated her compensation benefits, causally related to her September 25, 1999 accepted employment injury.

On September 25, 1999 appellant, then a 55-year-old flat sorting machine operator, filed a notice of traumatic injury alleging that she injured her lower back on that same day while pushing tubs of mail at work. Dr. Robert Mowery, a Board-certified family practitioner, diagnosed appellant with "a moderately severe lumbar strain/sprain" and opined that she was totally disabled. The Office accepted appellant's claim for lumbar strain on February 25, 2000. Appellant was totally disabled from September 26 to December 2, 1999 when she returned to limited duty.

Appellant requested a surgical procedure to repair her disc herniations. The Office referred appellant, along with a statement of accepted facts and the medical evidence of record, to Dr. Steven J. Valentino for a second opinion examination, to determine whether appellant's herniated disc was related to her accepted lumbar strain.

In a report dated May 9, 2000, Dr. Valentino opined that appellant's lumbar strain had resolved and that she had reached maximum medical improvement. He based his opinion on a post-myelogram computerized tomography, which revealed no evidence of disc herniation. He concluded that appellant's work-related injury was not responsible for any aggravation or acceleration of her underlying, degenerative lower back condition. Dr. Valentino also submitted a work capacity evaluation in which he stated that appellant's preexisting history of sciatica was related to a car accident in 1992 and that her degenerative disc was age related.

Appellant submitted a report from Dr. Steven J. Barrer, a Board-certified neurological surgeon, dated January 27, 2000, in which he discussed appellant's September 1999 employment injury but did not provide a history of appellant's lower back condition relating to her car

accident in 1992. Dr. Barrer discussed a November 13, 1999 magnetic resonance imaging (MRI) scan, which showed disc herniations at levels L4-5 and L5-S1 but did not provide an opinion on causal relationship.

On August 14, 2000 the Office issued a notice of proposed termination of compensation finding that the medical evidence of record indicated that appellant's work-related injury of September 25, 1999 had resolved.

On September 19, 2000 the Office received an August 21, 2000 report from Dr. Mowery, indicating that he disagreed with Dr. Valentino's opinion, since from 1992 to 1999 appellant had no back pain and all of her pain and discomfort began after her work-related injury.

The Office also received a September 26, 2000 report from Dr. Barrer, who also disagreed with Dr. Valentino and stated that appellant's imaging studies did show objective abnormalities. He stated:

“Although I do not think the accident she had caused any of the mild degenerative changes that we see on her imaging studies, it may not even have produced the abnormality that is causing the myelographic defect, but it certainly is related chronically to the onset of her clinical problem.”

By decision dated November 2, 2000, the Office finalized the proposed termination of compensation finding that the weight of the medical evidence of record rested with Dr. Valentino.

Appellant submitted a March 15, 2001 report from Dr. Barrer indicating that appellant was suffering from increased back and leg pain. Dr. Barrer stated that a March 12, 2001 MRI scan showed that appellant had a worsening of the left L5 radiculopathy. He opined that her mild disc herniation was enough to have caused the radiculopathy, but did not discuss the cause of her condition.

By letter dated March 1, 2001, appellant requested reconsideration. Appellant submitted medical reports from 1992 and 1993 related to her car accident. She maintained that she did not suffer a lower back injury at the time of the accident and that her current lower back condition only began in 1999 after her work-related injury. Appellant also submitted copies of the January 27, March 9 and September 26, 2000 reports from Dr. Barrer already contained in the record.

The Office also received a March 17, 2001 report from Dr. Mowery on April 30, 2001. Dr. Mowery diagnosed appellant with: “chronic left lumbar strain complicated by left lumbar herniated disc with unresolved sciatica, causally and chronologically related to the work injury of September 25, 1999.” He also opined that appellant was still disabled from sciatica and could not perform her full occupational duties.

By decision dated May 2, 2001, the Office denied modification of the previous decision.<sup>1</sup>

The Board finds that the Office did not meet its burden of proof.

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. 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. Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, the Office must establish that appellant no longer has residual of and employment-related condition which require further medical treatment.<sup>2</sup>

Section 8123 of the Federal Employees' Compensation Act<sup>3</sup> provides that if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician to resolve the conflict.<sup>4</sup> The Board has interpreted the statute to require more than a simple disagreement between two physicians. To constitute a true conflict of medical opinion, the opposing physicians' reports must be of virtually equal weight and rationale.<sup>5</sup>

In this case, the Board finds a conflict created by the opinion of Dr. Valentino who found that appellant's lumbar sprain was resolved and that her work-related injury was not responsible for any aggravation or acceleration of her underlying, degenerative lower back condition and the conclusion of Dr. Mowery on August 21, 2000 that appellant is still disabled due to the September 25, 1999 work injury and that her condition is related to her accepted lumbar strain.

As the Office did not resolve this conflict of medical opinion, it did not meet its burden of proof to terminate compensation benefits.

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<sup>1</sup> The Office also received medical evidence after May 2, 2001, the date of the Office's final decision, but the Board may not review this evidence. 20 C.F.R. § 501.2(c) indicates that the review of a case shall be limited to the evidence in the case record which was before the Office at the time of its final decision.

<sup>2</sup> *Marvin T. Schwartz*, 48 ECAB 521 (1997).

<sup>3</sup> 5 U.S.C. §§ 8101-8193 (1974); 5 U.S.C. § 8123(a); 20 C.F.R. § 10.321.

<sup>4</sup> *Shirley L. Steib*, 46 ECAB 309, 316 (1994).

<sup>5</sup> *Adrienne L. Wintrip*, 38 ECAB 373, 379 (1987).

The May 2, 2001 and November 2, 2000 decisions of the Office of Workers' Compensation Programs are reversed.

Dated, Washington, DC  
January 25, 2002

David S. Gerson  
Member

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member