

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LORETTA P. MYERS and DEPARTMENT OF THE AIR FORCE,
WRIGHT PATTERSON AIR FORCE BASE, Dayton, OH

*Docket No. 00-1326; Submitted on the Record;
Issued June 21, 2002*

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation effective November 30, 1990 on the grounds that she had no disability after that date due to her January 23, 1978 employment injury; (2) whether the Office properly rescinded its acceptance of appellant's claim for a schedule award; and (3) whether the Office properly rescinded its acceptance of appellant's claim for permanent aggravation of osteoarthritis and radiculopathy.

On January 23, 1978 appellant, then a 46-year-old procurement assistant, sustained lumbar and coccygeal strains and sprains and trochanteric bursitis. In November 1978, the Office also accepted that appellant sustained a permanent aggravation of osteoarthritis and radiculopathy due to the January 23, 1978 injury. Appellant received compensation from the Office for periods of disability and retired from the employing establishment effective November 30, 1990. By decision dated May 14, 1996, the Office granted appellant a schedule award for a 21 percent permanent impairment of her right leg and a 21 percent permanent impairment of her left leg. By decision dated October 29, 1996, an Office hearing representative set aside the Office's May 14, 1996 decision and remanded the case to the Office for further development of the medical evidence. He found that the record did not contain adequate findings regarding appellant's claimed permanent impairment and that the Office medical adviser did not adequately support his schedule award calculations. The Office hearing representative determined that, on remand to the Office, appellant should be referred to a specialist for further evaluation.

On remand, appellant was referred to Dr. Gerald S. Steiman, a Board-certified neurologist, for further evaluation. In a report dated December 13, 1996, Dr. Steiman determined that appellant's back problems were solely due to her nonwork-related lumbar osteoarthritis. The Office then determined that there was a conflict in the medical evidence

between Dr. Steiman and appellant's attending physicians¹ and referred appellant to Dr. Subodh K. Wadhwa, a Board-certified neurologist. In a report dated February 27, 1997, Dr. Wadhwa determined that appellant no longer had any disability due to her January 23, 1978 employment injury. By decision dated March 4, 1997, the Office terminated appellant's compensation effective that date. The Office based its termination on the opinion of Dr. Wadhwa.

By decision dated and finalized October 24, 1997, an Office hearing representative set aside the Office's March 4, 1997 decision and remanded the case to the Office for further development. He found that appellant had not been properly apprised of Dr. Wadhwa's role as an impartial medical specialist and that therefore he actually served as an Office referral physician. The Office hearing representative determined that, due to a continuing conflict in the medical evidence, the case should be referred to an impartial medical specialist.

On remand, the Office referred appellant to Dr. Arthur L. Hughes, a Board-certified neurologist, for an impartial medical examination and an opinion on her continuing employment-related disability and permanent impairment.² By decision dated June 9, 1998, the Office terminated appellant's compensation effective November 30, 1990 on the grounds that she had no disability after that date due to her January 23, 1978 employment injury. The Office also rescinded its acceptance of appellant's claim for a schedule award and rescinded its acceptance of her claim for permanent aggravation of osteoarthritis and radiculopathy. The Office based its termination and rescission determinations on the opinion of May 1, 1998 report of Dr. Hughes. By decision dated and finalized November 3, 1999, an Office hearing representative affirmed the Office's June 9, 1998 decision.

The Board finds that the Office met its burden of proof to terminate appellant's compensation effective November 30, 1990.

Under the Federal Employees' Compensation Act,³ once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.⁴ The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁵ The Office's burden of proof includes the necessity of

¹ In reports dated in mid to late 1996, Dr. Alan K. Jacobs, an attending Board-certified neurologist, and Dr. W. David Weston, an attending physician Board-certified in physical medicine and rehabilitation, determined that appellant had continuing disability and permanent impairment due to her January 23, 1978 employment injury.

² The Office had previously referred appellant to Dr. James M. Parker, a Board-certified neurologist, for an impartial medical examination. In a report dated January 16, 1998, Dr. Parker indicated that appellant had permanent impairment but acknowledged that this assessment was not based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993). The Office requested that Dr. Parker clarify his opinion and it was latter determined that Dr. Parker failed to adequately clarify his opinion.

³ 5 U.S.C. §§ 8101-8193.

⁴ *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

⁵ *Id.*

furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁶

In the present case, the Office properly determined that there was a conflict in the medical opinion between appellant's attending physicians and Drs. Steiman and Wadhwa, both Board-certified neurologists to whom the Office referred appellant, regarding whether appellant had continuing disability due to her January 23, 1978 employment injury and whether she had permanent impairment entitling her to a schedule award. In order to resolve the conflict, the Office properly referred appellant, pursuant to section 8123(a) of the Act, to Dr. Hughes, a Board-certified neurologist, for an impartial medical examination and an opinion on these matters.⁷

In situations where 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.⁸

The Board finds that the weight of the medical evidence concerning appellant's continuing employment-related disability is represented by the thorough, well-rationalized opinion of Dr. Hughes, the impartial medical specialist selected to resolve the conflict in the medical opinion. The May 1, 1998 report of Dr. Hughes establishes that appellant did not have disability after November 30, 1990 due to her January 23, 1978 employment injury.

In a report dated May 1, 1998, Dr. Hughes detailed appellant's factual and medical history and reported the findings on examination. He noted that myelogram testing of appellant's lumbar spine in 1978 and 1981 revealed normal results and that magnetic resonance imaging (MRI) testing from July 1987 revealed normal results. Dr. Hughes indicated that it was not until October 1993 that MRI testing showed early degenerative changes of the lumbar spine. He indicated that the medical evidence revealed that appellant's left leg pain did not develop until five months after the January 23, 1978 injury and therefore was not related to this injury. Dr. Hughes noted that appellant's claim had been expanded to include acceptance of permanent aggravation of osteoarthritis and radiculopathy and indicated that this acceptance was in error "as there is no evidence that [appellant] had any 'osteoarthritis' at the time of her injury as reflected by myelography and spine x-rays." He noted that a prior determination that appellant had

⁶ See *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁷ Section 8123(a) of the Act provides in pertinent part: "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." 5 U.S.C. § 8123(a). The Office also properly determined that prior referrals of appellant to Drs. Wadhwa and Parker, Board-certified neurologists, had defects which prevented either physician from serving as an impartial medical specialist.

⁸ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

impairment based on restricted motion of her left hip was “not really germane to the claim allowances.” Dr. Hughes stated:

“I can find no evidence of any remaining residuals due to the injury of January 23, 1978. As I have indicated above, [appellant] sustained a lumbar strain (a soft tissue injury) and there was no evidence of any radicular or bony involvement at the time. She did not develop left leg symptoms until five months following the fall. The cause of the left leg symptoms has remained uncertain, as multiple imaging studies over the years have shown either no abnormalities or simple age-related changes not causally related to the original injury. Thus, [appellant] has subjective complaints without objective findings. Since the left leg pain came on five months after the original fall, it is not causally related to the original injury. Its mechanism remains obscure.

“[Appellant] is not totally disabled from all work due to the residuals of the 1978 injury beginning November 30, 1990 and continuing. As I noted above, she experienced a soft tissue injury (lumbar strain), which should have resolved within days, weeks or months of the occurrence. She does at this time other medical problems, including a peripheral neuropathy and coronary artery disease. Although these conceivably may be work restricting, they are not causally related to the original injury. Taking into account *only* the original injury and the claim allowances related thereto, I find no evidence that [appellant] is totally disabled from all work.

“[Appellant] has a zero percent impairment of both the right and left legs, based on the claim allowances and the findings on today’s examination.”⁹

The Board has carefully reviewed the opinion of Dr. Hughes and finds that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issues of the present case. Dr. Hughes’ opinion is based on a proper factual and medical history.¹⁰ He provided medical rationale for his opinion by explaining that there was no objective evidence of appellant’s employment-related lumbar and coccygeal strains/sprains and trochanteric bursitis and that these conditions had resolved prior to November 30, 1990. Dr. Hughes further explained that the medical evidence showed that appellant had not sustained an employment-related permanent aggravation of osteoarthritis and radiculopathy. He noted that appellant’s continuing problems were due to her nonwork osteoarthritis and coronary artery disease.

The Board further finds that the Office properly rescinded its acceptance of appellant’s claim for a schedule award.

⁹ Dr. Hughes indicated that he had evaluated appellant’s impairment in accordance with the standards of the fourth edition of the A.M.A., *Guides*.

¹⁰ See *Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

The Board has upheld the Office's authority to reopen a claim at any time on its own motion under section 8128(a) of the Act and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.¹¹ The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.¹² It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.¹³ This holds true where, as here, the Office later decides that it has erroneously accepted a claim for compensation. To justify rescission of acceptance, the Office must establish that its prior acceptance was erroneous based on new or different evidence or through new legal argument and/or rationale.¹⁴

Section 8107 of the Act provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.¹⁵ Neither the Act nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants the Office has adopted the A.M.A., *Guides* (4th ed. 1993) as a standard for evaluating schedule losses and the Board has concurred in such adoption.¹⁶

The Board finds that the Office presented sufficient new evidence to justify its rescission of appellant's claim for a schedule award. By decision dated May 14, 1996, the Office granted appellant a schedule award for a 21 percent permanent impairment of her right leg and a 21 percent permanent impairment of her left leg.¹⁷ As noted above, the Office further developed appellant's claim with respect to her schedule award entitlement and appellant was referred to Dr. Hughes for resolution of a conflict in the medical evidence regarding this matter.

The Board finds that the weight of the medical evidence concerning appellant's schedule award entitlement disability is represented by the thorough, well-rationalized opinion of Dr. Hughes. The May 1, 1998 report of Dr. Hughes establishes that appellant did not have any

¹¹ *Eli Jacobs*, 32 ECAB 1147, 1151 (1981).

¹² *Shelby J. Rycroft*, 44 ECAB 795, 802-03 (1993). Compare *Lorna R. Strong*, 45 ECAB 470, 479-80 (1994).

¹³ See *Frank J. Meta, Jr.*, 41 ECAB 115, 124 (1989); *Harold S. McGough*, 36 ECAB 332, 336 (1984).

¹⁴ *Laura H. Hoexter (Nicholas P. Hoexter)*, 44 ECAB 987, 994 (1993); *Alphonso Walker*, 42 ECAB 129, 132-33 (1990); *petition for recon. denied*, 42 ECAB 659 (1991); *Beth A. Quimby*, 41 ECAB 683, 688 (1990); *Roseanna Brennan*, 41 ECAB 92, 95 (1989); *Daniel E. Phillips*, 40 ECAB 1111, 1118 (1989), *petition for recon. denied*, 41 ECAB 201 (1990).

¹⁵ 5 U.S.C. § 8107(a).

¹⁶ *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

¹⁷ By decision dated October 29, 1996, an Office hearing representative set aside the Office's May 14, 1996 schedule award and remanded the case to the Office for referral to another specialist. He found that the record did not contain adequate findings regarding appellant's claimed permanent impairment and that the Office medical adviser did not adequately support his schedule award calculations.

permanent impairment entitling her to a schedule award. In his report, Dr Hughes stated, “[Appellant] has a zero percent impairment of both the right and left legs, based on the claim allowances and the findings on today’s examination.” He provided medical rationale for his opinion by explaining that appellant did not show any objective findings of permanent impairment and by noting that her claim had been incorrectly accepted for permanent aggravation of osteoarthritis and radiculopathy.

At the time of the acceptance of appellant’s claim for a schedule award, an Office medical adviser had calculated appellant’s lower extremity impairment based on pain and motor loss associated with the L5 nerve distribution. However, this opinion is of limited probative value in that the Office medical adviser failed to provide an explanation of how his assessment of permanent impairment was derived in accordance with the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses.¹⁸ The record contained limited physical findings at that time and such findings did not support the calculations made by the Office medical adviser.

The Board further finds that the Office properly rescinded its acceptance of appellant’s claim for permanent aggravation of osteoarthritis and radiculopathy.

The Office presented sufficient new evidence to support its rescission of appellant’s claim for permanent aggravation of osteoarthritis and radiculopathy. The Board finds that the weight of the medical evidence concerning this matter is represented by the thorough, well-rationalized opinion of Dr. Hughes. The May 1, 1998 report of Dr. Hughes establishes that appellant did not sustain permanent aggravation of osteoarthritis and radiculopathy on January 23, 1978. In his report, he stated that the acceptance of appellant’s claim for these conditions was in error “as there is no evidence that [appellant] had any ‘osteoarthritis’ at the time of her injury as reflected by myelography and spine x-rays.” Dr. Hughes discussed the findings of diagnostic testing and explained how these findings showed that appellant did not have osteoarthritis on January 23, 1978 and therefore could not have sustained an aggravation of this condition on that date.

Dr. Hughes’ opinion is supported by the evidence of record pertaining to appellant’s diagnostic testing. This evidence would constitute new evidence as it was entered into the record after acceptance of appellant’s claim for permanent aggravation of osteoarthritis and radiculopathy. For example, as noted by Dr. Hughes, myelogram testing of appellant’s lumbar spine from July 1978 and January 1981 revealed normal results and MRI testing from July 1987 revealed normal results. It was not until October 1993 that MRI testing revealed degenerative facet disease at L3-4, L4-5 and L5-S1.

¹⁸ See *James Kennedy, Jr.*, *supra* note 16 (finding that an opinion which is not based upon the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant’s permanent impairment).

The November 3, 1999 decision of the Office of Workers' Compensation Programs dated is affirmed.¹⁹

Dated, Washington, DC
June 21, 2002

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁹ The record contains a January 26, 2000 Office decision finding that appellant received an overpayment of compensation which was not subject to waiver. Appellant has not appealed this decision and it is not currently before the Board.