

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOAN A. POSA and U.S. POSTAL SERVICE,
POST OFFICE, Pittsburgh, PA

*Docket No. 01-2255; Submitted on the Record;
Issued November 20, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits, effective September 9, 2000, on the grounds that her work-related disability had ceased on or before that date.

The case is on appeal to the Board for the second time.¹ On the first appeal, the Board reviewed the Office's May 11, 1998 decision, in which the Office, based on the opinion of the impartial medical specialist, Dr. W. Scott Nettrour, a Board-certified orthopedic surgeon, found that appellant did not have any continuing disability due to her accepted employment injury and terminated appellant's compensation benefits effective May 25, 1997. The Board found that Dr. Nettrour's opinion was not well rationalized and, therefore, the conflict in the medical evidence between appellant's treating physician, Dr. Leonard Merkow, an attending Board-certified anatomic and clinical pathologist and the second opinion physician, Dr. Patrick G. Laing, a Board-certified orthopedic surgeon, regarding whether appellant continued to have residual disability due to her accepted employment injury or whether she was capable of performing her date-of-injury position was not resolved. The Board concluded that the evidence failed to establish that appellant's work-related disability had ceased and reversed the Office's May 11, 1998 decision.

On March 26, 1997 appellant underwent an electromyogram (EMG) and nerve conduction studies (NCS). Dr. David M. Lobas, a Board-certified psychiatrist and neurologist, interpreted the studies on March 27, 1997 and stated that the EMG showed evidence of chronic denervation changes present involving muscles receiving L4-5 and S1 nerve root innervation on right. Dr. Lobas stated that the EMG also showed isolated denervation changes present involving left peroneous longus muscle which received L5 and S1 nerve root innervation. He stated that the findings suggested the presence of chronic radiculopathy with involvement at

¹ Docket No. 99-542 (issued February 7, 2000). The facts and history surrounding the prior appeal are set forth in the initial decision and are hereby incorporated by reference.

above nerve root levels. Dr. Lobas stated that the nerve conduction velocities were abnormal showing mild slowing of the right tibial motor nerve conduction velocity. He stated that the findings suggested early tibial motor neuropathy although the slowing was borderline at present.

The physical requirements of appellant's job as described in the job description of distribution clerk, machine were maximum lifting of 17 pounds and occasional pushing of 25 to 30 pounds. In a vocational report dated January 28, 1993, the rehabilitation counselor noted that appellant stated that she lifted trays weighing 10 to 15 pounds but never exceeded 20 pounds. At the hearing on October 22, 1990, Dr. Merkow testified that appellant told him that she was lifting a 25-pound tray when she injured herself in 1987. An affidavit by Paul E. Lewis, a Chief Grievance Officer, dated October 18, 1990, stated that a clerk must be able to lift sacks up to 70 pounds and to lift trays averaging 10 to 20 pounds per tray.

The Office referred appellant to a second impartial medical specialist, Dr. Robert M. Yanchus, a Board-certified orthopedic surgeon. In a report dated May 22, 2000, Dr. Yanchus considered appellant's history of injury, performed a physical examination and reviewed the March 26, 1997 EMG and NCS, which he found described "mild polyphasic potentials, greater on the right" and showed mild radiculopathy on the right. He stated that from the "standpoint of clinical importance, fibrillation and potential sharp waves are rated as a much more significant finding" but they were not present. Dr. Yanchus also noted that a computerized axial tomography scan dated June 17, 1987 documented degenerative disc changes at L5 with a midline protrusion. Referring to Figure 75, page 127, of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1994), he stated that appellant failed the "Validity Test," which meant the tighter straight leg raising angle exceeded the sum of sacral flexion/extension by more than 14 degrees, rendering the lumbosacral flexion test invalid.

Dr. Yanchus stated that appellant sustained a herniated disc at L5-S1 as a result of the nonwork-related motor vehicle accident on May 3, 1985. He stated that the findings of Dr. G. Malcolm Cottingham, a Board-certified orthopedic surgeon, on September 23, 1987 that there were no objective findings to support appellant's multiple subjective complaints indicated that appellant completely recovered from the motor vehicle accident. Dr. Yanchus stated that appellant had aggravation of a preexisting herniated disc at L5-S1 resulting from the October 18, 1987 employment injury. He stated that many of his findings described symptom magnification as in a hyperresponse to palpation, a discrepancy between straight leg raising seated/supine, pain on simulated rotation of trunk with arms at sides, inappropriate hypesthesia lower extremities not corresponding to anatomical dermatomes, inability to walk on heels and toes not supported by physical examination and the failure to pass the Validity Test for flexion and extension. Dr. Yanchus found that appellant reached maximum medical improvement on August 7, 1992 because Dr. Laing, a Board-certified orthopedic surgeon, who examined her at the time found that her multiple subjective complaints were not supported by objective findings. He also noted that, based on his May 14, 1996 examination, Dr. Nettrour had the same opinion. Dr. Yanchus opined that appellant could perform modified light work with frequent lifting of 10 pounds and occasionally 25 pounds. He stated that there were no restrictions for bending, stooping and reaching. Dr. Yanchus also stated that there were no physical restrictions or modifications and appellant could return to work at her former job. In a work capacity evaluation form, OWCP-5c, dated May 22, 2000, he stated that appellant could work full time with a lifting restriction of 25 pounds and breaks every 30 minutes.

In a notice of proposed termination dated July 18, 2000, the Office stated that Dr. Yanchus' opinion constituted the weight of the evidence and established that appellant recovered from the effects of her work injury.

By letter dated August 17, 2000, appellant's attorney opposed the proposed termination, contending that Dr. Yanchus' report was inconsistent in that Dr. Yanchus stated that appellant had recovered from her herniated disc resulting from the motor vehicle accident yet sustained an aggravation of the condition on October 18, 1987. The attorney noted that Dr. Yanchus stated that appellant could perform modified work with restrictions but also stated that appellant required no restrictions.

By decision dated August 30, 2000, the Office terminated appellant's compensation benefits, effective September 9, 2000, stating that Dr. Yanchus' report established that appellant recovered from the effects of her work injury and could perform her preinjury job of a letter, sorter, machine clerk.

By letter dated September 1, 2000, appellant requested an oral hearing before an Office hearing representative.

By decision dated December 15, 2000, the Office hearing representative found that Dr. Yanchus' opinion was insufficient to justify the Office's termination of benefits because Dr. Yanchus did not indicate whether appellant recovered from the October 18, 1987 employment injury and his opinion was unclear regarding appellant's work ability and physical restrictions. The Office hearing representative, therefore, instructed the Office to reinstate appellant's compensation benefits and obtain a supplemental report from Dr. Yanchus addressing whether appellant recovered from the October 18, 1987 employment injury, whether appellant could perform her preinjury work, which could require lifting up to 25 pounds and whether, if appellant could not perform her usual work, the disability was due to the October 18, 1987 employment injury or another cause.

In a supplemental report dated January 25, 2001, in response to the Office's question whether appellant continued to suffer from the October 18, 1987 employment injury, Dr. Yanchus replied no. He reiterated that on August 7, 1992 Dr. Laing stated that appellant made a complete recovery from her May 3, 1985 motor vehicle injury and her October 18, 1987 employment injury. Dr. Yanchus noted that Dr. Laing released appellant to return to light work for two or three months and then to full employment. He stated that on his May 22, 2000 examination appellant's subjective complaints were not supported by objective findings and that his findings were indicative of symptom magnification as in her failure to pass the Validity Test. Describing his restrictions, Dr. Yanchus stated that they were based on a review of the requirements of appellant's job title of machine distribution clerk, which had a maximum lifting requirement of 17 pounds with a horizontal pushing force of 25 to 30 pounds. He stated that the work restrictions described on the OWCP-5 addressed the job title of machine distribution clerk and had no connection with the October 18, 1987 employment injury. Dr. Yanchus stated that the work restrictions "were submitted neither to be preventative nor represent physical inability to perform any type of work."

In a notice of proposed termination of compensation dated March 1, 2001, the Office found that Dr. Yanchus' opinion including his supplemental report constituted the weight of the evidence and justified the Office's termination of benefits.

By letter dated April 2, 2001, appellant's attorney contended that Dr. Yanchus was biased, stating that he had represented Federal Employees' Compensation Act claimants since 1993 and had never reviewed a report from Dr. Yanchus, which agreed with appellant's treating physician and had never met a FECA claimant who was treated by Dr. Yanchus. Appellant's attorney also stated that Dr. Yanchus referred to "symptom magnification" in every report. Appellant's attorney stated that the Office should conduct the appropriate investigation into Dr. Yanchus' pattern of bias in accordance with the Federal (FECA) Procedure Manual, Part 3 -- *Medical Services*, Chapter 3.500.4b (September 1994), which states that appellant may participate in the selection of a physician if documented bias is shown by that physician. Appellant's attorney also stated that FECA Bulletin No. 00-01, issued November 5, 1999, states that the district office manager is responsible for "evaluating complaints about specific physicians and problems with the quality and timeliness of their reports." Further, appellant's attorney stated that Dr. Yanchus' supplemental opinion did not explain the contradictions in his first report and lacked medical rationale explaining appellant's alleged complete recovery. He also stated that Dr. Yanchus did not explain the objective evidence of the EMG/NCV showing residuals of appellant's work-related injury.

Appellant submitted a report from Dr. Lawson F. Bernstein, a Board-certified psychiatrist and neurologist, dated March 12, 2001. Dr. Bernstein reviewed appellant's history of injury, performed a physical examination and reviewed the March 27, 1997 EMG and NCS, which he stated showed chronic nerve damage at L4-5 and L5-S1 and were consistent with appellant's subjective complaints. He concluded that appellant had organic secondary mood disorder, depressed type and pain disorder due to L5-S1 radiculopathy which was of moderate to severe severity. Dr. Bernstein concluded that both these conditions were due "to her chronic complaints" and rendered appellant totally disabled. He also stated that appellant had a "s/p [status, postoperative] work[-]related injury as described with chronic radiculopathy."

By decision dated April 6, 2001, the Office terminated appellant's compensation benefits.

By letter dated April 11, 2001, appellant requested a review of the written record.

By decision dated August 16, 2001, the Office hearing representative affirmed the Office's April 6, 2001 decision.

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits, effective September 9, 2000, on the grounds that her work-related disability had ceased on or before that date.

Once the Office has accepted a claim, it has the burden of justifying 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.² The Office's burden of proof includes the necessity of furnishing rationalized medical evidence based on a proper factual and medical background.³

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.⁴

In this case, pursuant to the Board's February 7, 2000 decision, the Office referred appellant to a second impartial medical specialist, Dr. Yanchus. In his May 22, 2000 report, Dr. Yanchus found that appellant recovered from the herniated disc on September 23, 1987 and on October 18, 1987 sustained an aggravation of the herniated disc at work. He stated that she reached maximum medical improvement on August 7, 1992 based on the absence of objective findings in either Drs. Laing's and Nettrour's reports. Dr. Yanchus found that on physical examination there were no objective findings to support appellant's subjective complaints, that her complaints showed symptom magnification and she could perform light work with no frequent lifting of more than 10 pounds and no occasional lifting of more than 25 pounds. He also stated, however, that appellant did not require restrictions and could return to work at her former job. The Office subsequently terminated appellant's benefits, effective September 9, 2000, based on Dr. Yanchus' opinion. Appellant requested an oral hearing. In the December 15, 2000 decision, the Office hearing representative found that Dr. Yanchus' report was not well rationalized and remanded the case for the Office to obtain clarification of the report from Dr. Yanchus, with instructions for appellant's compensation to be reinstated.

In his January 25, 2001 supplemental report, Dr. Yanchus reiterated that he had found no objective findings for appellant's subjective complaints, that her symptoms were indicative of symptom magnification and appellant had recovered from the October 18, 1997 employment injury. In describing the restrictions he placed on appellant, he stated that they were based on a review of the requirements of appellant's job and the work restrictions in the OWCP-5 addressed the job title of machine distribution clerk. He stated that the restrictions were not related to the October 18, 1987 employment injury and did not represent appellant's physical inability to work. Dr. Yanchus, however, did not explain why he stated that appellant required any restrictions if she had completely recovered from her injury. Further, although he found that the EMG and NCS showed mild radiculopathy, which is an objective finding, he did not explain whether this was related to appellant's work-related injury. Dr. Lobas had interpreted the EMG and NCS as showing chronic denervation changes present at L4-5 and S1, which is the area of appellant's herniated disc. Further, in his May 22, 2000 report, Dr. Yanchus stated that appellant completely recovered from her herniated disc resulting from the 1985 motor vehicle accident prior to the October 18, 1987 employment injury, which is inconsistent with his own findings that appellant sustained an aggravation of the herniated disc on that date. In finding that appellant recovered from the herniated disc, Dr. Yanchus relied in part on Dr. Nettrour's report which was

² *Wallace B. Page*, 46 ECAB 227, 229-30 (1994); *Jason C. Armstrong*, 40 ECAB 907, 916 (1989).

³ *Larry Warner*, 43 ECAB 1027, 1032 (1992); *see Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁴ *Kathryn Haggerty*, 45 ECAB 383, 389 (1994); *Jane B. Roanhaus*, 42 ECAB 288 (1990).

discredited by the Board. For these reasons, Dr. Yanchus' opinion is not factually accurate and is still not well rationalized.⁵ Due to the deficiencies in his opinion, Dr. Yanchus' opinion is not entitled to the special weight generally accorded an impartial medical specialist and is not sufficient to resolve the conflict in the medical evidence in this case as to whether appellant continued to suffer from residuals of the October 18, 1987 employment injury.⁶

The case is, therefore, remanded for the Office to refer appellant, along with the case record and statement of accepted facts, to a new impartial medical specialist for an examination and evaluation as to whether appellant's disability resulting from the October 18, 1987 employment injury had ceased. The impartial medical specialist should address whether appellant requires any restrictions and if so, whether the disability manifested by those restrictions is related to the October 18, 1987 employment injury. He or she should address whether the results of the March 26, 1997 EMG and NCS are in any way related to the October 18, 1987 employment injury. Following any further development deemed necessary, the Office should then issue a *de novo* decision.

The August 16 and April 6, 2001 decisions of the Office of Workers' Compensation Programs are hereby vacated and remanded for further action consistent with this decision.

Dated, Washington, DC
November 20, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

⁵ Appellant's attorney did not present documented evidence of bias and, therefore, Dr. Yanchus' opinion may not be rejected on that basis.

⁶ See *James R. Driscoll*, 50 ECAB 146, 155 (1998).