

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JUDITH A. VINING and U.S. POSTAL SERVICE,
GENERAL MAIL FACILITY, North Reading, MA

*Docket No. 02-1747; Submitted on the Record;
Issued November 15, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective June 28, 2001 on the grounds that appellant's work-related disability had ceased.

On August 20, 2000 appellant, then a 62-year-old distribution manual clerk, filed an occupational disease claim alleging that on December 1, 1999 she became aware of her back condition. Appellant further alleged that her preexisting back condition was aggravated by factors of her federal employment.

By letter dated December 4, 2000, the Office accepted appellant's claim for aggravation of low back strain.

On February 6, 2001 an Office registered nurse recommended that appellant undergo a second opinion examination based on a review of appellant's case record. By letter dated March 29, 2001, the Office referred appellant along with a statement of accepted facts, a list of specific questions and medical records to Dr. Mordechai Kamel, a Board-certified orthopedic surgeon, for a second opinion examination. By letter of the same date, Dr. Kamel was advised of the referral.

Dr. Kamel submitted an April 18, 2001 report revealing a history of appellant's December 1, 1999 employment-related back condition. He noted his findings on physical examination. Dr. Kamel stated that appellant did not bring x-rays with her and refused to allow him to take x-rays of her back because she had them done previously and assured him that they were normal. He noted that appellant offered to bring them to him.¹ Dr. Kamel indicated a review of medical records and opined that there were no objectively verifiably residuals from the

¹ The Board notes that in referring appellant to Dr. Kamel, the Office requested that appellant bring all x-rays to the examination.

accepted work-related lumbosacral strain of 1999-2000. He believed that appellant's accepted work-related strain had resolved and that there was no longer a work-related disability secondary to this injury. Dr. Kamel concluded that with respect to the lumbosacral strain, appellant had reached maximal medical improvement. In an April 20, 2001 work capacity evaluation, Dr. Kamel stated that appellant could not work because previous diagnoses would interfere, but there was no reason appellant could not work with regard to the 1999 injury.

Based on Dr. Kamel's reports, the Office issued a notice dated May 24, 2001 proposing to terminate appellant's compensation. The Office advised appellant that she had 30 days in which to submit additional evidence or argument if she disagreed with the proposed termination of compensation.

In a June 1, 2001 response, appellant stated that she continued to suffer residuals of her employment injury and that Dr. Kamel's report was based on an inaccurate medical background because he did not review x-rays and magnetic resonance imaging (MRI) results. Appellant apologized for failing to bring the requested medical evidence to her examination and reiterated her previous explanation for this omission as set forth in her April 26, 2001 letter.² Appellant also indicated that she continued to have back and hip symptoms and physical limitations.

In a June 19, 2001 letter, appellant requested an extension of the 30-day period in which to submit additional evidence, as her treating physician was presently unable to submit a report.

By decision dated June 28, 2001, the Office terminated appellant's compensation on the basis that she no longer had any continuing disability due to her accepted employment injury. In a July 7, 2001 letter, appellant requested an oral hearing before an Office representative.

A report by Dr. Joel A. Saperstein, appellant's treating physician Board-certified in orthopedic surgery, dated June 18, 2000, revealed a review of appellant's medical records, his treatment of appellant beginning on January 24, 2000, appellant's complaints of continued pain in the low back and his findings on physical and objective examination. Dr. Saperstein diagnosed traumatic arthritis of the low back, chronic low back strain and ruptured intervertebral disc. He opined that based upon appellant's history, and his physical findings and review of the records, it appeared that this diagnosis was causally related to the December 1999 employment injury and superimposed upon preexisting employment accidents going back to 1991. He further opined that appellant had a five percent permanent impairment of her low back based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. Dr. Saperstein recommended that appellant could work 5.5 hours a day with restrictions.

In an April 10, 2002 decision, the hearing representative affirmed the Office's decision on the grounds that appellant no longer had any continuing disability due to her accepted employment injury based on Dr. Kamel's reports.

² In her April 26, 2001 letter, appellant explained that she overlooked the Office's request in its letter to bring x-rays to her appointment with Dr. Kamel. Appellant stated that she offered to get the x-rays or to fax them to Dr. Kamel, but he refused indicating that he wanted to take his own x-rays. Appellant further stated that she agreed to have one quick back x-ray, but not a full set of five x-rays due to feeling inundated with radiation from several x-rays and MRI testing. Appellant asked whether she should collect the x-rays and send them to Dr. Kamel.

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination or modification of compensation benefits.³ The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁴ The Office's burden includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵

When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial specialist, pursuant to section 8123(a) of the Federal Employees' Compensation Act,⁶ to resolve the conflict in the medical opinion. In this case, although, Dr. Kamel, the Office referral physician, offered an opinion that appellant's employment-related back condition had ceased, Dr. Saperstein, appellant's treating physician, continued to diagnose an employment-related back condition that rendered her partially disabled. The Office terminated appellant's compensation benefits on the grounds that her employment-related injury had ceased. The Board finds that, in light of the reports of Drs. Kamel and Saperstein, who are both Board-certified physicians, a conflict has been created on the issue of whether appellant continued to be disabled due to the December 1, 1999 employment injury. Consequently, the Office did not meet its burden of proof in terminating appellant's compensation.⁷

To resolve this conflict, the Office should have referred the case record, including all test results and a statement of accepted facts to a Board-certified specialist for resolution of the issue of whether appellant had any continuing disability due to her December 1, 1999 employment injury.

³ *Raymond W. Behrens*, 50 ECAB 221 (1999).

⁴ *Carl D. Johnson*, 46 ECAB 804, 809 (1995).

⁵ *Raymond W. Behrens*, *supra* note 3.

⁶ 5 U.S.C. § 8123(a).

⁷ *See Gail D. Painton*, 41 ECAB 492 (1990).

The April 10, 2002 and June 28, 2001 decisions of the Office of Workers' Compensation Programs are hereby reversed.

Dated, Washington, DC
November 15, 2002

Michael J. Walsh
Chairman

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member