

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of GILDA THOMAS and DEPARTMENT OF THE ARMY,  
MATERIEL COMMAND, Monmouth, NJ

*Docket No. 02-1931; Submitted on the Record;  
Issued November 19, 2002*

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DECISION and ORDER

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

The issue is whether appellant met her burden of proof to establish that she had disability after November 15, 1992 due to her February 26, 1976 employment injury.

This is the third appeal in the present case. In the first appeal, the Board issued a decision and order<sup>1</sup> on March 3, 1998 in which it affirmed the August 16 and December 14, 1994 decisions of the Office of Workers' Compensation Programs in part, set aside the decisions in part and remanded the case to the Office for further development. The Board determined that the Office properly terminated appellant's compensation effective November 15, 1992 on the grounds that she had no disability after that date due to her February 26, 1976 employment injury.<sup>2</sup> The Board found that the Office properly determined that the weight of the medical evidence regarding this issue rested with the July 16, 1992 opinion of Dr. Norman Eckbold, the Board-certified orthopedic surgeon who served as an impartial medical specialist. The Board noted that the burden of proof then shifted to appellant to establish that she had employment-related disability after November 15, 1992. The Board found that, after the November 15, 1992 termination, appellant submitted November 29, 1993 and April 25, 1994 reports of Dr. David Weiss, an attending Board-certified orthopedic surgeon, which created a conflict in the medical opinion evidence with Dr. Eckbold regarding whether she had employment-related disability after November 15, 1992. The Board determined that, therefore, appellant and the case record should be referred to an appropriate specialist for an impartial medical examination to be followed by an appropriate decision on this matter.

After the Board's March 3, 1998 decision, the Office referred appellant to Dr. Mark Reiner, an osteopath, for an impartial medical examination. Based on the opinion of Dr. Reiner,

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<sup>1</sup> Docket No. 95-1506.

<sup>2</sup> The Office accepted that on February 26, 1976 appellant, then a 48-year-old inventory management specialist, sustained a traumatic low back sprain superimposed on discogenic disease at L4-5 and traumatic effusion of the right knee due to a fall at work.

the Office then determined that appellant did not have employment-related disability after November 15, 1992. In the second appeal, the Board issued an order remanding case<sup>3</sup> on March 22, 2001 in which it set aside the September 17, 1998 and June 8, 1999 decisions of the Office and remanded the case to the Office for further development. The Board determined that Dr. Reiner could not serve as an impartial medical examiner as he was an osteopath and did not have special qualifications which would otherwise render him qualified to serve as an impartial medical examiner. The Board found that, therefore, there was a continuing conflict in the medical opinion evidence regarding appellant's employment-related disability after November 15, 1992 and that appellant and the case record should be referred to an impartial medical specialist for an examination and opinion on this matter to be followed by an appropriate decision. The facts and circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

After the Board's March 22, 2001 order, the Office referred appellant and the case record to Dr. Jaswinder S. Grover, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion regarding whether she had disability after November 15, 1992 due to her February 26, 1976 employment injury. By decision dated July 31, 2001, the Office denied appellant's claim on the grounds that she did not meet her burden of proof to establish that she had disability after November 15, 1992 due to her February 26, 1976 employment injury. The Office found that the weight of the medical opinion evidence regarding this matter rested with the well-rationalized opinion of Dr. Grover, the impartial medical specialist. By decision dated and finalized April 8, 2002, an Office hearing representative affirmed the Office's July 31, 2001 decision.

The Board finds that appellant did not meet her burden of proof to establish that she had disability after November 15, 1992 due to her February 26, 1976 employment injury.

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>4</sup> The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.<sup>5</sup> After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that she had an employment-related disability, which continued after termination of compensation benefits.<sup>6</sup>

As described above, the Office properly terminated appellant's compensation effective November 15, 1992 based on the opinion of Dr. Eckbold, the Board-certified orthopedic surgeon who served as an impartial medical specialist. The burden of proof then shifted to appellant to establish that she had employment-related disability after November 15, 1992. Due to a new

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<sup>3</sup> Docket No. 00-163.

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

<sup>5</sup> *Id.*

<sup>6</sup> *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

conflict in the medical opinion evidence, the Office properly referred appellant, pursuant to section 8123(a) of the Act, to Dr. Grover, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter.<sup>7</sup>

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.<sup>8</sup>

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Grover, the impartial medical specialist selected to resolve the conflict in the medical opinion evidence. The June 19, 2001 report of Dr. Grover establishes that appellant had no disability due to her February 26, 1976 employment injury after November 15, 1992.

In his June 19, 2001 report, Dr. Grover provided a detailed history of appellant's factual and medical history. Dr. Grover indicated that upon examination appellant exhibited negative straight leg testing and nerve root tension signs for both lower extremities. He indicated that appellant showed mild tenderness on deep palpation of the lumbar spine. Dr. Grover provided a diagnosis of "persistent mechanical back pain and intermittent lower extremity radiculitis in this patient who suffers from significant lumbar degenerative spondylosis with identified pathology at the L4-5 and L5-S1 discs." He indicated that appellant was partially disabled due to her underlying degenerative disease and her advanced age. Dr. Grover stated:

"At this point, the patient's primary symptoms are related to low back pain with right lower extremity radiculopathy. These are, in all likelihood, related to underlying disc pathology across multiple levels, but primarily the discs at L4-5 and L5-S1. This pathology is essentially degenerative in etiology. There [are] significant findings of osteoarthritis. The osteoarthritis was not precipitated and/or caused by the industrial injury of 1976.

"It appears that this patient sustained a significant soft tissue injury about her lumbar spine in 1976, which in this examiner's opinion, should have resolved many years ago. It is my professional opinion that this patient's symptomatology is related to underlying degenerative osteoarthritis which is quite severe."

The Board has carefully reviewed the opinion of Dr. Grover and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Grover's opinion is based on a proper factual and medical history in that he had the benefit of an accurate and up-to-date statement of accepted facts, provided a thorough factual and medical history and accurately summarized the relevant medical

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<sup>7</sup> 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).

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

evidence.<sup>9</sup> Dr. Grover provided medical rationale for his opinion by explaining that appellant did not have objective evidence of the February 26, 1976 employment injury. He explained that the February 26, 1976 soft-tissue injury was of such a nature that it would have resolved years ago. Dr. Grover indicated that appellant's symptoms were solely due to her nonwork-related degenerative osteoarthritis.<sup>10</sup>

For these reasons, appellant did not meet her burden of proof to establish that she had disability after November 15, 1992 due to her February 26, 1976 employment injury.

The April 8, 2002 and July 31, 2001 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC  
November 19, 2002

Alec J. Koromilas  
Member

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

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<sup>9</sup> See *Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

<sup>10</sup> In part of his report, Dr. Grover indicated that appellant's partial disability was "primarily related" to the degenerative osteoarthritis as opposed to the February 26, 1976 injury. When reading the opinion as a whole, however, it is clear that Dr. Grover was of the opinion that the February 26, 1976 injury did not continue to have any residual effect.