

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of KRISTEN E. SPOLAR and U.S. POSTAL SERVICE,  
POST OFFICE, Billings, MT

*Docket No. 02-457; Submitted on the Record;  
Issued October 23, 2002*

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DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation entitlement on or after December 30, 2000 causally related to her August 14, 1999 herniated disc injury.

The Office accepted that on August 14, 1999 appellant, then a 35-year-old part-time postal clerk, injured her lower back and neck while lifting tubs of flats off the floor to distribute to carriers. The claim was accepted for a herniated nucleus pulposus at L5-S1 and appellant received appropriate compensation and medical benefits.

Dr. Pius Baggenstos, a Board-certified neurologist, treated appellant for the accepted condition from September 8, 1999 through November 28, 2000, as a result of the August 14, 1999 employment-related injury. In reports dated September 8 and November 9, 1999, he discussed appellant's history of injury, symptoms at that time and diagnosed her with low back sprain with radiculopathy into her right leg and herniated disc L5-S1 on the right. Dr. Baggenstos related appellant's condition to the accepted work injury and stated in both reports that she was unable to work at that time.

In a duty status and narrative report dated December 16, 1999, Dr. Baggenstos approved appellant for limited-duty work for two hours a day. In a January 3, 2000 report, Dr. Baggenstos stated that appellant was able to return to part-time work and increased her ability to work to approximately four hours a day. She thereafter returned to work on limited duty for two hours a day on January 6, 2000. In a duty status report dated January 13, 2000, appellant was approved for up to six hours a day of certain limited duties.

In a February 17, 2000 report, Dr. Baggenstos indicated that he saw appellant for a follow up and related that she felt awful due to a recent cold, shooting pain in her leg and foot and social problems at home. He stated that appellant returned to work four hours a day, sorting mail; however, "she just cannot do it." Dr. Baggenstos removed appellant from work for two weeks for treatment and determination of whether she required surgery.

In a report dated March 2, 2000, Dr. Baggenstos indicated that he had taken appellant off work and recommended that she seek chiropractic treatment due to increased pain. He also referred appellant for a magnetic resonance imaging (MRI) scan of the lumbar spine, which was performed on March 3, 2000. The MRI showed that appellant had a small right paracentral disc herniation at L5-S1.

In a report dated March 16, 2000, Dr. Baggenstos referred appellant to Dr. Peter Sorini, a Board-certified neurologist, to determine whether surgical intervention was necessary and noted that at that point she remained disabled from work.

In a report dated March 26, 2000, Dr. Sorini reviewed appellant's history and pain complaints and his findings on examination. He indicated that appellant had chronic right S1 radiculitis with a normal examination, however, a lot of pain. Dr. Sorini indicated that he would like to obtain an electromyography (EMG)/nerve conduction study to see if there was an electrical correlate to her symptoms. He indicated that if appellant had evidence of S1 nerve root irritation, he would recommend surgery or on the other hand, continued conservative care and return to work. In a March 26, 2000 report, Dr. Baggenstos agreed with Dr. Sorini's findings. An EMG study of appellant's lower extremity was conducted on April 20, 2000, which revealed normal findings.

In a May 31, 2000 report, Dr. Baggenstos noted that appellant should remain off work for two weeks.

On June 26, 2000 appellant was referred to a second opinion physician, Dr. Max Iverson, a Board-certified orthopedic surgeon. The Office provided Dr. Iverson a copy of her job description, the facts of the case and further advised him that the employing establishment had completed a surveillance of appellant performing recreational activities including bending, lifting, walking, twisting, playing pool and dancing between April 5 and May 27, 2000. The Office enclosed videotapes of the surveillance for his review.

In a medical report dated July 20, 2000, Dr. Iverson indicated that he reviewed the evidence provided to him and performed a physical examination of appellant. He noted a history of appellant's work-related injury and following a physical examination, he diagnosed lumbosacral myofascial strain by history, resolved and a very small disc protrusion, L5-S1. Dr. Iverson stated:

“[Appellant's] complaints of pain, disability and activity restrictions are out of proportion to objective findings currently exhibited on medical examinations and are not supported by objective medical evidence. The only objective medical finding of significance is that of a disc protrusion at L5-S1 but this is very small lesion and does not compress the exiting nerve roots nor the spinal cord.”

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“There does not appear to be any medical evidence to support continued disability of [appellant] from her date-of-injury job that would result as a consequence of the alleged work-related injury. In addition, the surveillance videotapes

demonstrate at a time the videos were taken, that she has in fact been able to function in a reasonable normal fashion.”

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“[Appellant] is not considered to be disabled from the work-related injury....”

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“There is nothing to indicate on the accompanied videotapes of [appellant] had any complaints of pain or restrictions of motion, abnormal posturing or repositioning, etc. that would suggest injury behavior....”

\* \* \*

“She has had two MRI’s as well as the EMG/nerve conduction studies, all of which had failed to show any significant pathology....”

In a report dated September 5, 2000, Dr. Baggenstos noted his belief that appellant had a nerve root compromise and stated that he would get a repeat EMG. He further noted that appellant remained off work.

On November 2, 2000 the Office proposed to terminate appellant’s compensation entitlement based on the report from Dr. Iverson, which it found represented the weight of the medical evidence.

By decision dated December 4, 2000, the Office terminated appellant’s entitlement to compensation on or after December 30, 2000 on the grounds that the weight of the medical evidence supported that appellant had no ongoing condition or disability causally related to the accepted employment injury.

In a letter dated December 28, 2000, appellant, through counsel requested an oral hearing, which was held on July 26, 2001.

Appellant, through counsel, submitted further evidence in support of her claim. The employing establishment submitted an investigative memorandum with extensive evidence in support of its challenge of appellant’s claimed disability.

In a November 28, 2000 report, Dr. Baggenstos indicated that appellant was able to return to light duty with a lifting restriction of 15 pounds for 3 hours a day.

By decision dated and finalized October 12, 2001, an Office hearing representative affirmed the Office’s December 4, 2000 termination decision in part, on the grounds that the weight of the medical evidence established that appellant had no continuing disability associated with the accepted employment injury. The Office hearing representative modified the December 4, 2000 decision to reflect only denial disability, rather than denial of all compensation. The Office hearing representative determined that the Office failed to establish cessation of appellant’s employment-related condition, given that the medical record supported

the presence of the employment-related herniated disc at L5-S1. Accordingly, the Office hearing representative invited appellant to submit for consideration all unpaid medical bills related to the accepted employment condition for reimbursement.

The Board finds that the Office failed to meet its burden of proof in terminating appellant's wage-loss benefits.

Once the Office has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.<sup>1</sup> Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing either, that the disability has ceased or that it is no longer related to the employment.<sup>2</sup>

The Board finds a conflict was created by the opinion of Drs. Baggenstos and Sorini, Board-certified neurologists and that of Dr. Iverson, a Board-certified orthopedic surgeon and referral physician. Drs. Baggenstos and Sorini, in various reports of record, indicated that appellant was disabled from work due to her employment-related herniated disc at L5-S1 and potential nerve root compromise. Dr. Iverson, the second opinion specialist, found no objective findings or evidence to support that appellant was disabled from work causally related to the accepted work injury. The Board, therefore, finds that as a conflict remains in the evidence of record regarding appellant's ability to return to work, the Office did not meet its burden of proof in terminating appellant's wage-loss benefits.

Accordingly, the decision of the Office of Workers' Compensation Programs dated October 12, 2001 is reversed.

Dated, Washington, DC  
October 23, 2002

Alec J. Koromilas  
Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>1</sup> *Curtis Hall*, 45 ECAB 316 (1994).

<sup>2</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989).