

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROSE E. TAUSEL and U.S. POSTAL SERVICE,  
POST OFFICE, Leavittsburg, OH

*Docket No. 00-486; Submitted on the Record;  
Issued September 20, 2002*

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DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,  
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation.

On January 27, 1992 appellant, then a 48-year-old part-time rural letter carrier, was taking a plastic tray of mail out of her vehicle when she slipped on snow and ice, landing on her knees. She stopped working on March 13, 1992 and she received continuation of pay through April 26, 1992. The Office accepted appellant's claim for contusions of both knees and a herniated L4-5 disc. Appellant returned to limited duty, two hours a week, on September 17, 1993. The Office paid compensation for the hours appellant did not work.<sup>1</sup> The employing establishment subsequently terminated appellant's limited-duty position and the Office began payment of compensation for the additional hours appellant did not work.

In a September 5, 1995 letter, the Office requested an updated medical report on appellant's ability to work, noting that the employing establishment wished to offer appellant a position that would provide employment for three hours a day, five days a week, thereby restoring appellant to the hours she was working prior to the employment injury. In a September 19, 1995 report, Dr. Benjamin Kulper, an internist, stated that appellant had continued back pain and numbness. He related that appellant reported her back pain was aggravated when she sorted mail at her workstation, leaning over the table to put letters in the sorting boxes, working at shoulder level or higher to put mail in mailboxes and bending and stooping to place mail in lower level mailboxes. Dr. Kulper indicated that appellant could not lift, carry or maneuver large, heavy boxes or packages. He noted that casing mail also aggravated appellant's symptoms. Dr. Kulper reported that appellant could sit for only 30 minutes at a time. After that time, the pressure of sitting caused aggravation of pain and numbness. He recommended that appellant's work hours be increased from two to three a week.

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<sup>1</sup> The Office found that appellant received a \$12,082.54 overpayment in compensation because she was paid compensation as if she was a full-time employee rather than a part-time employee. An Office hearing representative, in a December 29, 1994 decision, found that appellant was without fault in the creation of the overpayment. The Office, however, did not waive recovery of the overpayment.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Moses Leeb, a Board-certified orthopedic surgeon, for an examination and second opinion. In a February 21, 1996 report, Dr. Leeb indicated that appellant's current complaints consisted of persistent low back pain aggravated by prolonged weight-bearing activities, especially repetitive bending and lifting. He noted that appellant had occasional radiation into the right leg. Dr. Leeb concluded, on the basis of his examination, that appellant had contusions of both knees that were asymptomatic except for occasional pain in the right knee. He indicated that appellant showed mild residual signs of a lumbar myofasciitis, although a magnetic resonance imaging scan showed a herniated disc. Dr. Leeb stated that appellant had no objective evidence of motor or sensory deficit and the range of motion of the lumbosacral spine was only slightly limited. He stated that appellant could perform her work three hours a day, five days a week. In an accompanying work restriction evaluation, Dr. Leeb indicated that appellant was restricted from repetitive bending and lifting over 10 pounds. He commented that appellant had work restrictions of three hours a day, five days a week, probably permanently. Dr. Leeb stated that part of appellant's residual low back condition was due to preexisting condition incurred in a 1989 injury. He commented that appellant had reached maximum improvement.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Vydialinga Raghavan, an orthopedic surgeon, for an examination to resolve the conflict in the medical evidence between Drs. Kulper and Leeb on appellant's work restrictions. In a November 4, 1996 report, Dr. Raghavan noted that medical records showed appellant had been diagnosed in 1989 with a herniated L5-S1 disc on the right with pain into the right leg. He stated that appellant had no atrophy of the legs, no weakness in the muscles of the legs and no hypoanesthesia along the dermatomal patterns of the legs. Dr. Raghavan reported that appellant had inconsistent results between straight leg raising tests while supine and while sitting. He indicated that appellant had no paravertebral spasm, no trigger points and no bony tenderness in her back. Dr. Raghavan found that appellant's knees had no effusion, no instability and no tenderness. He diagnosed a herniated L4-5 disc, degenerative disc disease of the lumbosacral region, and mild bilateral chondromalacia of the patellae. Dr. Raghavan concluded that appellant had reached a delayed recovery syndrome due to the employment injury. He recommended a functional restoration program consisting of physical therapy, occupational therapy, psychological services and medical management. Dr. Raghavan stated that the program should be done for a maximum of 12 weeks and discontinued if there was no improvement. He stated that, based on his examination, most of appellant's symptoms were subjective. Dr. Raghavan commented that he did not see any objective evidence in appellant's back on examination even though she had a documented history of a herniated L4-5 disc with degenerative disc disease above and below that region. He indicated that the contusion and strains in appellant's knees had resolved. Dr. Raghavan noted that appellant was developing mild chondromalacia in both knees which was due to normal wear and tear. He stated that appellant should stay at her current work status, two hours weekly, while she underwent a functional restoration program. Dr. Raghavan indicated that appellant would be able to go back to work 15 hours a week provided she had beneficial results from the functional restoration program.

Appellant was referred for physical therapy. In an April 2, 1997 report, a therapist reported that appellant could perform part-time light work, could lift up to 10 pounds frequently, and up to 50 pounds occasionally. She indicated that appellant could sit, stand or walk continuous for a half hour continuously, could sit or stand intermittently for two hours a day, and could walk intermittently for one hour a day. The therapist commented that appellant would

need a 5-minute break every 20 to 30 minutes while sitting and a 15-minute break every 4 hours while standing. She concluded that appellant could work three hours a day, five days a week.

In a June 14, 1997 report, Dr. Kulper noted the recommendation for appellant's work restrictions but related that appellant stated that she was unable to work the hours recommended. He commented that he therefore had contrasting reports on appellant's ability to work. Dr. Kulper recommended another opinion on whether appellant was able to do the type of work for the hours specified.

In an August 11, 1997 report, an Office claims examiner indicated that appellant could perform the duties of a hotel clerk. He noted that the job required the ability to lift up to 10 pounds frequently and 20 pounds occasionally. The claims examiner stated that appellant had the transferable skills necessary to meet the vocational requirements of the job. He reported that the position was performed in sufficient numbers in a part-time capacity so as to be reasonably available within appellant's commuting area. The claims examiner calculated the weekly wage on the basis of working 20 hours a week.

In a November 14, 1997 letter, the Office informed appellant that it proposed to reduce her compensation based on a determination of her loss of wage-earning capacity. In a January 5, 1998 decision, the Office reduced appellant's compensation to reflect a 51 percent loss of wage-earning capacity.

Appellant requested a hearing before an Office hearing representative. In a September 3, 1998 decision, an Office hearing representative found the case not in posture for a hearing. She indicated that Dr. Raghavan found appellant could work 15 hours a week provided she had beneficial results from the functional capacity program. The Office hearing representative noted that the Office had not referred appellant back to Dr. Raghavan to determine if she had such results from the program. She also pointed out that Dr. Raghavan had indicated that appellant could work 15 hours a week, not the 20 hours a week used by the Office to determine appellant's wage-earning capacity. The Office hearing representative also commented that neither Dr. Leeb nor Dr. Raghavan found any objective evidence that appellant continued to have residuals of the employment injury. She therefore set aside the Office's January 5, 1998 decision and remanded the case to the Office to clarify appellant's wage-earning capacity and to determine whether she continued to have residuals of the employment injury.

The Office referred appellant to Dr. Raghavan as ordered by the Office hearing representative. In an October 26, 1998 report, Dr. Raghavan stated that appellant had reached maximum medical improvement regarding her knees. He indicated that her employment injury contusion and strain had resolved. Dr. Raghavan noted that appellant had chondromalacia of the right knee, related to wear and tear on the knee. He stated that, in regard to appellant's back condition, as she had no documented evidence of radiculopathy, she only required a maintenance level of treatment. Dr. Raghavan indicated that appellant had residual symptoms in her back which were due to degenerative disc disease of the lumbosacral spine, attributable to the normal wear and tear seen in appellant's age group. He concluded that appellant was capable of returning to modified work. In a November 3, 1998 report, Dr. Raghavan indicated that appellant could work three hours a day, five days a week. He noted that appellant could walk, stand, reach, reach above her shoulder and twist intermittent and was limited in pushing, pulling and lifting.

The Office requested clarification from Dr. Raghavan, asking whether appellant had any objective findings which supported that she had a work-related L4-5 herniated disc or whether all of her work-related conditions, including the herniated disc, had resolved. In a November 19, 1998 response, Dr. Raghavan stated that appellant's work-related herniated L4-5 disc was in remission. He commented that there was no evidence of radiculopathy in his most recent examination and that most of the symptoms were subjective in nature.

In a November 24, 1998 letter, the Office asked Dr. Raghavan that, if appellant had no remaining objective residuals from the employment injury, then were the work restrictions he provided preventative in nature and related to appellant's nonwork-related subjective symptoms. The Office asked whether appellant could return to her regular carrier work duties, based solely on the objective residuals from the accepted work diagnoses. In a December 23, 1998 response Dr. Raghavan stated that his work restrictions were basically preventative in nature, to prevent recurrence of chondromalacia as well as radiculopathy in the lower leg.

In a January 8, 1999 letter, the Office informed appellant that it proposed to terminate her compensation on the grounds that she had no objective residuals from her employment injury and was no longer disabled from her duties as a rural letter carrier. The Office gave appellant 30 days to submit any evidence or arguments if she disagreed with the proposed termination. Appellant submitted a report from Dr. Raghavan,<sup>2</sup> who noted that, at the time of the employment injury, she had a preexisting herniated disc with radiculopathy which had resolved with conservative treatment. Dr. Raghavan stated that, if appellant returned to work as a rural letter carrier, she could have a recurrence of the problem resulting in radiculopathy. He concluded that it was more than a medical probability that appellant could not go back to work as a rural letter carrier.

In a February 8, 1999 decision, the Office terminated appellant's compensation on the grounds that the evidence of record failed to support ongoing, objective disability related to the January 25, 1992 employment injury.

In a February 15, 1999 letter, appellant requested a hearing before an Office hearing representative which was conducted on July 19, 1999. In a September 8, 1999 decision, the Office hearing representative affirmed the Office's February 8, 1999 decision.

The Board finds that the Office properly terminated appellant's compensation.

Once the Office accepts 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.<sup>3</sup>

Drs. Kulper and Leeb reached differing conclusions on whether appellant had any objective residuals from the January 25, 1992 employment injury and whether appellant could return to work at her former duties as a part-time rural letter carrier. The Office therefore

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<sup>2</sup> The Board notes that, while Dr. Raghavan's report was dated November 24, 1998, it is more likely that the report was written and dated December 24, 1998.

<sup>3</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989).

referred appellant to Dr. Raghavan to resolve the conflict in the medical evidence. The Office hearing representative also indicated that Dr. Raghavan was to resolve whether appellant had any remaining objective residuals of the employment injury. Dr. Raghavan concluded that appellant's bilateral knee condition had resolved and his herniated L4-5 disc was in remission. He imposed work restrictions on appellant but indicated that the restrictions were preventative in nature. Dr. Raghavan stated that appellant would not be able to return to her prior position as a rural letter carrier but indicated that his opinion was based on appellant's prior herniated L5-S1 disc, which occurred in 1989. There is nothing in the record submitted on appeal which shows that the earlier 1989 injury occurred in the performance of duty. Dr. Raghavan therefore did not relate appellant's inability to perform the duties of her former position to her accepted January 24, 1992 employment injury. In situations when there exists opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial 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>4</sup> Dr. Raghavan's reports were based on an accurate medical history and expressed well-rationalized opinions that appellant's disability was no longer related to the effects of the accepted employment injury. His reports provided a sufficient basis for the Office's decision to terminate appellant's compensation.

The decisions of the Office of Workers' Compensation Programs dated September 8 and February 8, 1999 are hereby affirmed.

Dated, Washington, DC  
September 20, 2002

Michael J. Walsh  
Chairman

Alec J. Koromilas  
Member

David S. Gerson  
Alternate Member

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<sup>4</sup> *James P. Roberts*, 31 ECAB 1010 (1980).