

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHELLE A. OFFREDO and U.S. POSTAL SERVICE,
PURITAS PARK STATION, Cleveland, OH

*Docket No. 02-2327; Submitted on the Record;
Issued February 14, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly terminated benefits.

On December 28, 1995 appellant, then a 35-year-old carrier, filed a notice of traumatic injury and claim for continuation of pay/compensation alleging that on December 26, 1995 she pulled a muscle in her right hip, leg or back in the performance of her federal duty. On March 27, 1996 appellant's claim was accepted for hip strain. The accepted conditions were later updated to include lumbar disc herniation.

Appellant received treatment from Dr. E.B. Marsolais, a Board-certified orthopedic surgeon. By letter dated February 5, 1999, the Office referred appellant to Dr. Sheldon Kaffen, a Board-certified orthopedic surgeon, for a second opinion. In a medical report dated February 23, 1999, Dr. Kaffen stated:

"The claimant's accepted work injury is right hip strain and lumbar disc herniation. The claimant no longer has physical findings to indicate ongoing residuals of a right hip sprain. In addition, the claimant has no ongoing residuals to indicate the presence of a herniated intervertebral lumbar disc. Her current diagnosis would be chronic lumbar strain/sprain, which I believe is directly related to the work injury of December 26, 1995. There are no remaining objective findings to indicate ongoing residuals of the accepted condition of right hip strain and herniated lumbar disc."

Dr. Kaffen further opined that appellant was unable to perform her date-of-injury job as a letter carrier, as she was restricted from frequent bending and lifting more than 20 to 25 pounds. He believed that these restrictions would be permanent. Dr. Kaffen no longer saw the need for appellant to continue her water jogging or nautilus program, programs that had been recommended by Dr. Marsolais. In response to questions from the Office, in a note dated

March 9, 1999, Dr. Kaffen stated that his restrictions were due to pain and were preventative in nature.

The Office found that a conflict existed between the opinion of appellant's treating physician, Dr. Marsolais, and the second opinion physician, Dr. Kaffen. Accordingly, appellant was referred to Dr. Malcolm Brahms, a Board-certified orthopedic surgeon, for an impartial medical examination. In a medical opinion dated April 13, 1999, Dr. Brahms stated that appellant was capable of working an eight-hour day. He recommended that she return to the employing establishment, although he recommended no lifting over 20 to 25 pounds, and avoid repetitive bending and lifting below the waist level. Dr. Brahms indicated that there was no need for the aquatic therapy or physical therapy to be continued. He noted no evidence to suggest any formal further treatment.

In a medical report dated May 24, 1999, Dr. Marsolais reviewed the reports of Drs. Kaffen and Brahms, and indicated: "They fully agree with my diagnosis, yet with total inconsistency go on to say that the patient no longer needs the strong muscles necessary to function with this diagnosis. I have no idea how they manage to reach this conclusion." He stated that appellant will need the program permanently or will need a spinal fusion. On June 4, 1999 he indicated that his prediction had come true and appellant was now in severe pain and unable to work at her lighter-duty job.

On June 11, 1999 appellant's authorization for continuing physical/aquatic therapy was denied. The termination of benefits was finalized by decision dated October 10, 2000.

By letter dated October 16, 2000, appellant requested a hearing.

In a March 9, 2001 medical report, Dr. Marsolais requested that the Office approve therapy for another three months. He noted that neither Dr. Brahms nor Dr. Kaffen were spinal experts. Dr. Marsolais noted that both doctors agree with the diagnosis and the fact that she has permanent restrictions, but fail to appreciate the need for treatment of her permanent injuries.

A hearing was held on April 18, 2001, at which time appellant testified that she worked part time from 1997 to June 2000, and stopped working at that time. By decision dated July 27, 2001, the hearing representative found that as Dr. Brahms had provided no medical rationale in support of his conclusion, his opinion was insufficient to represent the weight of medical evidence in determining that the employment-related condition had ceased. He concluded that the Office had failed to meet its burden of proof to terminate benefits, vacated the earlier decision and remanded the case to the Office.

By letter dated August 29, 2001, the Office requested that Dr. Brahms answer specific questions.

By letters dated August 31 and October 26, 2001, Dr. Marsolais asked for at least another three months of therapy.

By report dated September 10, 2001, Dr. Brahms indicated that the restrictions he placed on appellant were principally prophylactic in nature pending improvement of her symptoms and

that at this point, there was no evidence to support any significant objective finding of residual injury. He indicated that he agreed with the weight restrictions of 20 to 25 pounds.

By decision dated November 20, 2001, the Office determined that the residuals of appellant's December 26, 1995 injury had resolved effective November 19, 2001.

By letter dated December 4, 2001, appellant requested a hearing. A hearing was held on April 30, 2002, at which time appellant testified that she still had pain in her lower back which radiated into her leg.

By decision dated April 30, 2002, the hearing representative affirmed the November 20, 2001 decision terminating benefits, as he found that there was no objective evidence of appellant's ongoing complaints of pain.

The Board finds that the Office improperly 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.¹

In the instant case, appellant's treating physician, Dr. Marsolais, was of the opinion that appellant needed continuing treatment for her permanent injuries. The physician to whom the Office referred appellant for a second opinion, Dr. Kaffen, opined that there were no remaining objective findings to indicate ongoing residuals of the accepted condition of right hip strain and herniated lumbar disc.

In situations where 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.² Finding a conflict in the evidence, the Office referred appellant to Dr. Brahms to resolve the conflict. Dr. Brahms concluded that there was no evidence to support any significant objective finding of residual injury. However, his opinion is not sufficiently rationalized. Dr. Brahms did not explain his conclusions in terms of physical or diagnostic findings, or provide any medical rationale to support his conclusion. Therefore his opinion is insufficient to represent the weight of medical evidence in determining that the employment-related condition has ceased. As the Office's decision to terminate appellant's compensation was based on Dr. Brahms' report, the Office has not met its burden of proof in terminating appellant's compensation on the grounds that the effects of his employment injury have ceased.

¹ *Jason C. Armstrong*, 40 ECAB 907 (1989).

² *James P. Roberts*, 31 ECAB 1010 (1980).

The decision of the Office of Workers' Compensation Programs dated April 30, 2002 is reversed.

Dated, Washington, DC
February 14, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member