

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LESLIE J. AITALA and U.S. POSTAL SERVICE,
POST OFFICE, Hicksville, NY

*Docket No. 03-980; Submitted on the Record;
Issued July 22, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective January 27, 2002.

On January 9, 1987 appellant, then a 33-year-old postal worker, filed a notice of traumatic injury and claim for compensation (Form CA-1), alleging that she felt pain in the middle of her back and front rib cage after pulling a postcon. She remained off work for one week before returning to limited light duty. On February 6, 1987 appellant was treated in the emergency room and was diagnosed with cervical and upper thoracic sprain. On April 29, 1987 she filed a claim for recurrence. In a February 2, 1988 decision, the Office accepted appellant's claim for muscle strain of the thoracic and lumbar spine. She returned to work but missed time intermittently until she stopped work in August of 1995. Appellant has not returned to work. She filed a recurrence claims on January 9, 1988, September 25, 1991, November 19, 1994 and August 4, 1995 that were all denied.

In a March 2, 1998 report, Dr. Harry Levine, a Board certified orthopedic surgeon, wrote that x-rays revealed a swan neck deformity of the cervical spine with onchovertebral, particularly on the right side at the C5-6 level with narrowing of the disc space at the C5-6 level. He found that appellant has experienced a striking loss of neck motion as her condition worsened. Dr. Levine diagnosed her with a herniated cervical disc at C5-6 with right radiculitis and found her totally disabled due to the 1987 injury. In a December 22, 1998 decision, the Office reopened appellant's claim and accepted the August 4, 1995 recurrence claim and paid her for total temporary disability.

In a December 12, 2000 report, Dr. Levine wrote that appellant continues to be quite symptomatic with complaints of pain in her neck radiating into her arms and pain in her back radiating into her legs. His examination revealed diffuse tenderness of the cervical spine, flexion to 20/30, a foramina compression and a positive Soto-Hall's test. Examination of her lumbosacral spine revealed diffuse tenderness, flexion at 60/90, positive Kemp and Lasegue tests bilaterally in a sitting position at 90 degrees and in the supine position at 40 degrees. Dr. Levine

diagnosed appellant with herniated cervical and lumbar discs with radiculitis and opined that she was totally disabled. A February 16, 2001 report from him indicated that appellant had essentially no change in her condition.

In an April 23, 2001 letter, the Office referred appellant to Dr. Richard Goodman an orthopedist, for a second opinion. In a May 22, 2001 report, he reported that appellant presented with a normal gait. She could toe walk, but not heel walk and had limited cervical motion of 15 degrees of flexion and 5 degrees of extension, 10 degrees of right and left rotation and 5 to 10 degrees of right and left lateral flexion. He found she had a normal straight leg raising test to 190 degrees in the sitting position. Dr. Goodman found no clinical findings of asymmetry of sensory perception, motor power or reflexes in the upper or lower extremities consistent with herniated discs. He opined that her back injury in January 1987, had resolved because he could find no objective clinical findings consistent with these diagnoses. Dr. Goodman concluded that appellant could perform her date-of-injury job.

The Office determined that a conflict in the medical evidence existed and referred appellant for an impartial medical examination. In an August 8, 2001 report, Dr. Steven Borkow, a Board certified orthopedic surgeon, wrote that appellant presented wearing both a neck collar and back brace and indicated that she had worn these devices on a continuous basis since her injury in 1987. On examination she walked on her toes, but could not walk on her heels. Appellant's anterior flexion was limited to when her fingertips reached the knee level. She had approximately 10' of hyperextension in her back. Anterior flexion of the chin was approximately two fingerbreadths from the chest. Dorsiflexion was approximately 20 degrees; lateral rotation 20 to 30 degrees to each side. Shoulder motions were full. Straight leg raising caused pain by 45 degrees bilaterally and appellant was unable to maintain both legs off the examining table simultaneously due to pain. Dr. Borkow diagnosed chronic cervical, thoracic and lumbar sprain. He wrote that he would have expected appellant's symptomatology to have resolved many years ago, but her constant pain and continued full time use of the neck collar and back brace indicates this had not occurred. Dr. Borkow noted that appellant's inability to walk more than 1 to 2 blocks combined with her inability to sit for more than 10 to 15 minutes at a time makes it unlikely that she can return to any functional type of activity. He added that she has been under treatment for pain for 14 years. Throughout this period there were no significant episodes that exacerbated appellant's pain. Dr. Borkow could find no medical evidence to justify changing her status.

In a November 9, 2001 letter, the Office sent Dr. Borkow the findings of a postal investigation and asked if this information changed his opinion. Included in the packet of information were photographs of appellant entering her appointment with him wearing her brace and returning home carrying it. She was observed gardening and driving her car for approximately 50 minutes at a time, starting a pull gas lawn mower and mowing her lawn on three separate occasions. Appellant was observed lifting a large bag of potting soil into the trunk of her car along with large clay flowerpots. She was photographed spending the afternoon at the race track, sitting on a bench with no back support, walking back and forth from the grandstand to the betting window and into the horse paddock area. Appellant was photographed pushing a man in a wheel chair.

In a November 15, 2001 letter, Dr. Borkow wrote that he had reviewed the videotape and photographs and if the person pictured in the photographs was appellant, then this information is markedly different from the information he obtained during the examination. He noted that in the pictures, appellant was not wearing the neck collar and back brace at anytime and that she was doing activities that her reported symptomatology would not suggest she could do. Dr. Borkow noted that she was pushing and pulling a lawn mower for protracted periods of time with no apparent distress; he also noted that appellant was able to move all segments of her neck and spine as well as lift, carry and throw gardening supplies with no apparent distress. Dr. Borkow concluded that he would expect appellant to be able to carry out her full duties as a postal clerk.

In a December 3, 2001 letter, the Office proposed terminating appellant's compensation based on the November 15, 2001 report of Dr. Borkow. She was given 30 days to submit further evidence. Appellant did not respond and in a January 24, 2002 decision, the Office terminated her compensation effective January 27, 2002.

In a November 12, 2002 letter, appellant's representative requested reconsideration arguing that Dr. Goodwin's opinion was conclusory and, therefore, insufficient to create a conflict. Appellant also submitted an October 18, 2002 report from Dr. Marc Chernoff, an orthopedist, who indicated that she presented with complaints of neck, right arm, elbow and hand pain, as well as lower back and right hip pain. He diagnosed her with chronic neck and lower back pain with a history of a herniated disc at C5-6. In a January 14, 2003 report, Dr. Engracia Lazatin, interpreted a magnetic resonance imaging (MRI) scan and diagnosed appellant with herniated disc at C6-7, bilateral C6 radiculopathy, bilateral S1 radiculopathy, post traumatic cervical/lumbar sprain/strain and myofascial pain syndrome.

In a January 31, 2003 decision, the Office denied modification of its January 24, 2002 decision, finding the arguments raised and the medical evidence submitted insufficient to overcome the weight of Dr. Borkow's opinion as the impartial medical specialist.

The Board finds that the Office properly terminated appellant's compensation effective January 27, 2002.

Under the Federal Employees' Compensation Act,¹ once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.² The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.³ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁴

¹ 5 U.S.C. §§ 8101-8193.

² *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

³ *Id.*

⁴ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

The Office properly determined that there was a conflict in the medical opinion between Dr. Levine, appellant's attending Board-certified orthopedic surgeon, and Dr. Goodman, a Board-certified orthopedist, acting as an Office referral physician, regarding whether appellant continued to have residuals of the January 9, 1987 employment injury. In order to resolve the conflict, the Office properly referred appellant, pursuant to section 8123(a) of the Act, to Dr. Borkow for an impartial medical examination and an opinion on the matter.⁵

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.⁶

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Borkow, the impartial medical specialist selected to resolve the conflict in the medical opinion. His report dated August 8 and November 15, 2001 establish that appellant had no disability due to her January 9, 1987 employment injury.

The Board has carefully reviewed the opinion of Dr. Borkow 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. Borkow'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 evidence. Moreover, he provided a proper analysis of the factual and medical history and the findings on examination, including the results of diagnostic testing and reached conclusions regarding appellant's condition which comported with this analysis.⁷ Dr. Borkow provided medical rationale for his opinion by explaining that absent any reported significant episodes that would exacerbate her symptomatology, he would have expected appellant's injuries to have resolved years before. But based on her symptoms and her statements that pain required her to wear a neck and back brace, clearly her injuries had not resolved. In his November 15, 2001 letter, Dr. Borkow revised that opinion after he had reviewed the videotape and photographs from the postal investigation. He indicated that he saw appellant performing numerous activities that she had indicated that she could not perform; and she performed them with no apparent stress. Based on this new information, Dr. Borkow concluded that appellant was no longer disabled from her accepted injury of January 9, 1987.

After the Office's January 24, 2002 decision terminating appellant's compensation effective January 27, 2002, she submitted additional medical evidence which she felt showed that she was entitled to compensation after January 27, 2002, due to residuals of her employment injury. The Board has held that after termination or modification of benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant.

⁵ 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).

⁶ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

⁷ *See Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

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.⁸

The Board has reviewed the additional evidence submitted by appellant and notes that it is not of sufficient probative value to establish that she had residuals of her January 9, 1987 employment injury after January 24, 2002. Neither the report from Dr. Chernoff nor the report from Dr. Lazatin provides a reasoned medical opinion with respect to an employment-related condition after January 27, 2002.

The decision of the Office of Workers' Compensation Programs dated January 31, 2003 is hereby affirmed.

Dated, Washington, DC
July 22, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

⁸ *Talmadge Miller*, 47 ECAB 673, 679 (1996); *see also George Servetas*, 43 ECAB 424 (1992).