

**United States Department of Labor
Employees' Compensation Appeals Board**

ARLENE M. MOSBERG-JAMES, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Cleveland, OH, Employer**

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**Docket No. 04-2229
Issued: March 15, 2005**

Appearances:

Alan J. Shapiro, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman

WILLIE T.C. THOMAS, Alternate Member

MICHAEL E. GROOM, Alternate Member

JURISDICTION

On September 13, 2004¹ appellant, through her attorney, filed a timely appeal of the Office of Workers' Compensation Programs' merit decisions dated August 16, 2004 and September 9, 2003, terminating her compensation benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office has met its burden of proof to terminate appellant's compensation benefits.

¹ Although appellant's request for appeal was not filed with the Board until September 13, 2004, this request was postmarked September 8, 2004 within one year of the date of the September 9, 2003 initial termination decision. 20 C.F.R. § 501.3(d)(2) and (d)(3)(ii).

FACTUAL HISTORY

This case has previously been before the Board on appeal. In a July 23, 2001 decision,² the Board noted that appellant, a letter carrier, slipped in the performance of duty on December 11, 1981 sustaining employment-related contusions and bruises of the neck, back and legs. She sustained a nonemployment-related automobile accident on January 26, 1982 and the employing establishment terminated her on July 6, 1984. The Board found that the Office had properly determined that there was a conflict of medical opinion evidence regarding whether her continuing disability was related to the accepted conditions of her employment injury or to nonwork-related conditions of degenerative disc disease, spondylolisthesis at L4-5, spinal stenosis and exogenous obesity. This conflict was created by the opinions of Dr. David T. Yu, an attending Board-certified physician in physical medicine and rehabilitation, and Dr. VydiaInga G. Raghavan, a second opinion Board-certified orthopedic surgeon. The Board determined that the opinion of Dr. Richard Kaufman, a Board-certified orthopedic surgeon, selected as referee physician, was speculative and not supported by sufficient medical rationale to constitute the weight of the medical opinion evidence. The facts and the circumstances of the case as set forth in the Board's prior decision are adopted herein by reference.

In a letter dated September 13, 2001, the Office noted that appellant was entitled to reinstatement of her compensation benefits beginning June 27, 1998. The Office informed her that a new impartial examination would be scheduled. On September 29, 2001 appellant elected to receive compensation benefits retroactive to June 27, 1998. The Office entered her on the periodic rolls on December 31, 2001.

Appellant submitted a report dated August 28, 2001 from Dr. Robert D. Zaas, a Board-certified orthopedic surgeon, who opined that appellant was totally disabled, but failed to provide any opinion as to the relationship of this disability to her employment injury. He completed a form report on October 8, 2001 noting appellant's history of injury. Dr. Zaas diagnosed contusions/strain of the neck, back and legs as well as sprain, cervical spine and sprain, lumbar spine. He indicated with a checkmark "yes" that appellant's condition was due to her employment injury.

On January 28, 2002 the Office referred appellant, a statement of accepted facts and list of specific questions to Dr. Edwin A. Hissa, a Board-certified orthopedic surgeon, for a referee examination to resolve the conflict of medical opinion evidence. In a note dated March 8, 2002, Dr. Hissa stated that appellant's physical examination revealed a fairly normal gait and reduced forward flexion with some reversal of spinal motion. He noted that recent x-rays demonstrated spondylolisthesis at L4-5 and some degenerative disc disease. Dr. Hissa completed a narrative report on July 21, 2002 describing appellant's history of injury and reviewing the medical records. He stated:

“[Appellant] originally sustained an accident at work. Subsequent to this it was aggravated by motor vehicle accident or it was virtually recovered and the motor vehicle accident caused a new injury pattern. Since the time of [appellant's]

² Docket No. 00-1239 (issued July 23, 2001).

original examination and the time of my examination the range of motion of her lower back has remained virtually the same. She has no continuing disability related to her original work injury. This is not to say that [appellant] does not have complaint or disability or medical diagnoses. She has exhibited all the hallmarks of disease processes that occur as a person ages and is obese. Clearly these conditions are not work related.”

Dr. Hissa concluded that the natural history of soft tissue injury is to blend into the background fabric of aches and pains associated with life in general as one ages. He found that appellant did not have a continuing work-related illness preventing her from work.

The Office requested a supplemental report from Dr. Hissa on October 25, 2002 and asked that he provide detailed physical findings as well as his opinion as to whether appellant’s accepted work-related conditions have resolved. He responded on January 21, 2003 and stated that appellant’s work-related conditions of contusions and bruises relative to the back and legs had completely resolved with no objective findings to support the continuing presence of these conditions 20 years later. In regard to appellant’s physical examination, Dr. Hissa noted that he inspected and observed her regarding body type, posture, sequence of motion, simple ambulatory skills and strength testing of the lower extremities. He found an overweight female with adequate motor function, poor posture and symmetric adequate strength of the lower extremities. Dr. Hissa stated that palpation of the affected areas revealed no pathology related to her work condition. He stated that appellant’s forward flexion was poor and that she had reversal of spinal motion with no signs of nerve root tension. Dr. Hissa concluded, “These are characteristics of arthritic conditions and only represent sprain or herniated disc in combination with other findings which were not present on this patient.”

The Office requested a further supplemental report on February 20, 2003 detailing the procedures of each test Dr. Hissa performed and the results.

Appellant submitted a report dated September 17, 2002 from her attending physician, Dr. Zaas reported his findings on physical examination and concluded that appellant was totally disabled.

The Office proposed to terminate appellant’s compensation benefits on August 6, 2003 based on Dr. Hissa’s reports and allowed 30 days for her response if she disagreed. She did not respond.

By decision dated September 9, 2003, the Office finalized the proposed termination of compensation benefits effective that date.

Appellant submitted a report from Dr. Zaas dated August 28, 2003, in which he noted her history of injury and reviewed Dr. Hissa’s reports. Dr. Zaas stated that appellant had recovered from the contusions and bruises accepted by the Office as employment related. However, he also opined that the December 11, 1981 employment injury resulted in a sprain/strain of the cervical and lumbar spines as well as contusion to the head and back. Dr. Zaas stated that this injury caused aggravation and acceleration of preexisting lumbar degenerative disc disease and

osteoarthritis. He concluded that appellant was totally disabled due to her December 11, 1981 employment injury.

Appellant, through her attorney, requested an oral hearing on September 14, 2003. On October 18, 2003 Dr. Zaas again reviewed Dr. Hissa's report and opined that appellant's low back symptoms began with the December 11, 1981 employment injury and that she was totally disabled due to this injury beginning in 1984. He opined that the December 11, 1981 employment injury caused an aggravation and acceleration of appellant's preexisting lumbar degenerative disc disease and osteoarthritis.

Appellant testified at the oral hearing on May 19, 2004 that her condition after the December 11, 1981 employment injury had never improved. By decision dated August 16, 2004, the hearing representative found that the Office properly terminated her compensation benefits effective September 9, 2003. He found that Dr. Hissa's reports constituted the weight of the medical opinion evidence, that Dr. Hissa reviewed Dr. Zaas' prior opinions that appellant sustained additional work-related conditions and disagreed with his conclusions. The hearing representative concluded that as Dr. Zaas' reports were not based on an accurate factual background the reports were not sufficient to overcome the special weight accorded Dr. Hissa's reports or to create a new conflict with these reports.

LEGAL PRECEDENT

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.³ The Office may not terminate compensation without establishing that disability ceased or that it was no longer related to the employment.⁴

The Federal Employees' Compensation Act provides that, if there is a 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 The implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician of an Office medical adviser or consultant, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case.⁶

It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on proper factual and medical background must be given special weight.⁷

³ *Jorge E. Stotmayor*, 52 ECAB 105, 106 (2000).

⁴ *Mary A. Lowe*, 52 ECAB 223, 224 (2001).

⁵ 5 U.S.C. §§ 8101-8193, 8123.

⁶ 20 C.F.R. § 10.321.

⁷ *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

ANALYSIS

In the prior decision, the Board found an unresolved conflict of medical opinion evidence regarding whether appellant's continuing disability was related to the accepted conditions of her employment injury, contusions to the back, neck and legs, or to conditions of degenerative disc disease, spondylolisthesis at L4-5, spinal stenosis and exogenous obesity which had not been accepted as employment related.

The Office referred appellant to Dr. Hissa, a Board-certified orthopedic surgeon, to resolve this conflict. He reviewed her factual and medical history, performed a physical examination and reported his conclusions. Dr. Hissa found appellant to be an overweight female with adequate motor function, poor posture and symmetric adequate strength of the lower extremities. He stated that palpation of the affected areas revealed no pathology related to her work condition. Dr. Hissa stated that appellant's forward flexion was poor and that she had reversal of spinal motion with no signs of nerve root tension. He concluded that her findings were characteristics of arthritic conditions and that the findings only represented sprain or herniated disc in combination with other findings which were not present on appellant's examination.

Dr. Hissa stated that since the time of her original examination the range of motion of appellant's lower back had remained virtually the same. He concluded that she had no continuing disability related to her original work injury, but that she exhibited all the hallmarks of disease processes that occur as a person ages and is obese. Dr. Hissa noted that the natural history of soft tissue injury was to blend into the background fabric of aches and pains associated with life in general as one ages. He found that appellant's work-related conditions of contusions and bruises relative to the back and legs had completely resolved with no objective findings to support the continuing presence of these conditions 20 years later. Dr. Hissa noted that her current conditions were not work related and that she did not have a continuing work-related illness preventing her from work.

The Board finds that this report was based on a sufficient factual background and medical background to constitute the weight of the medical opinion evidence and resolve the existing conflict of medical opinion evidence. The Board further finds that Dr. Hissa offered sufficient medical reasoning and rationale in support of his opinions that appellant's accepted employment-related conditions had resolved and that she had no continuing work-related disability. Dr. Hissa stated that there were no objective findings to support the continuing presence of contusions and bruises relative to the employment injury of 20 years ago. He attributed appellant's current condition to the aging process and her weight noting that her physical findings were characteristic of arthritic conditions. Dr. Hissa concluded that appellant's accepted employment injuries had blended into the background fabric of age-related aches and pain.

Appellant has submitted medical reports from her attending physician, Dr. Zaas, a Board-certified orthopedic surgeon, supporting her total disability for work due to her employment-related injuries. On October 8, 2001 Dr. Zaas indicated with a checkmark "yes" that her diagnosed conditions of contusions/strain of the neck, back and legs as well as sprains of the cervical and lumbar spines were due to her 1981 employment injury. The Board has held that an opinion on causal relationship which consists only of a physician checking "yes" to a medical

form report question on whether the claimant's condition was related to the history given is of little probative value. Without any explanation or rationale for the conclusion reached, such a report is insufficient to establish causal relationship.⁸

In reports dated August 28 and October 18, 2003, Dr Zaas asserted that, although appellant had recovered from her accepted employment injuries, she had sustained additional injuries as a result of the 1981 employment injury, sprain/strains of the cervical and lumbar spines as well as contusion to the head and back as well as aggravation and acceleration of appellant's preexisting lumbar degenerative disc disease and osteoarthritis. He did not offer any medical reasoning in support of his opinions explaining how or why appellant's employment incident resulted in these additional conditions. Without medical rationale this report is not sufficient to overcome the weight accorded Dr. Hissa as a referee physician or to create a conflict with these reports.

CONCLUSION

The Board finds that Dr. Hissa's reports constitute the weight of the medical opinion evidence and that the Office met its burden of proof to terminate appellant's compensation benefits based on the findings and conclusions of these reports.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 16, 2004 and September 9, 2003 are affirmed.

Issued: March 15, 2005
Washington, DC

Alec J. Koromilas
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁸ *Lucrecia M. Nielson*, 41 ECAB 583, 594 (1991).