

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KATHLEEN McKINNON and U.S. POSTAL SERVICE,
POST OFFICE, Cleveland, OH

*Docket No. 00-2797; Submitted on the Record;
Issued April 26, 2002*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation effective December 6, 1999.

On February 2, 1995 appellant, then a 37-year-old letter carrier, injured her back in the performance of duty when she fell on slippery stairs while delivering the mail. The Office accepted appellant's traumatic injury claim for cervical and thoracic muscle strains. Appellant received appropriate compensation and returned to full duty on March 29, 1995.

On June 27, 1997 appellant stopped work and filed a claim for a recurrence of disability. The Office expanded appellant's claim to include a torn right rotator cuff, right shoulder strain and precipitation of a herniated cervical disc at C5-6 and C6-7. Appellant began receiving compensation on the periodic rolls for temporary disability.

Appellant was under the care of Dr. Jeffrey S. Morris, a Board-certified orthopedist, for treatment of her work injury. When Dr. Morris retired, appellant's treatment was transferred to one of Dr. Morris' associates, Dr. Gerald M. Yosowitz, a Board-certified orthopedist. The record further indicates that appellant was seen in consultation with Dr. Dale E. Braun, a Board-certified orthopedic surgeon, who recommended that appellant undergo C5 corpectomy with iliac crest graft fusion and plate placement.¹ Appellant, however, would not agree to have the surgery performed.

In an August 28, 1998 report, Dr. Yosowitz noted that he had very little in the way of treatment left for appellant since she had refused to undergo surgery. He opined that appellant could perform a light-duty desk job so long as she did not do any repetitive casing of mail and no

¹ A magnetic resonance imaging (MRI) scan performed on May 6, 1998, in conjunction with Dr. Braun's surgical consultation, showed central protrusion of the C5-6 disc with some upward migration behind C5. This was noted as leading to indentation of the central spinal cord.

lifting or working with her arms above the shoulder level. He also advised that she should not work with her head down or flexed in one position for more than a half hour without a break.

The Office referred appellant for vocational rehabilitation and she was assigned a field nurse. In a report dated June 26, 1998, the field nurse indicated that, while appellant had agreed to return to work, the employing establishment was having difficulty finding a job within her medical restrictions.²

On October 8, 1998 the employing establishment offered appellant a job as a “PTF [m]odified [d]istribution [c]lerk” for the hours of 11:30 a.m. to 8.00 p.m. Appellant noted on November 23, 1998 on the back of the job offer form that she was neither accepting nor rejecting the offered position. Appellant also submitted a November 23, 1998 notation from Dr. Yosowitz that she was disabled from work from June 12, 1997 to April 1, 1999 due to a cervical disc herniation, thoracic and cervical sprain and a rupture to the rotator cuff.

In a January 20, 1999 report, Dr. Yosowitz verified that it was his opinion that appellant could return to work on or after April 1, 1999 with the restrictions outlined in his August 28, 1998 report.

On February 24, 1999 the employing establishment offered appellant a job as a modified PTF clerk. The position was described as involving the use of a computer keyboard, lifting one letter or flat at a time, lifting clipboard, writing, lifting two ounce carrier scanner, driving to customer’s homes or businesses, along with intermittent sitting and standing. Restrictions were listed as no casing mail, no reaching above shoulders and no lifting to exceed five pounds.

Appellant accepted the limited-duty position on March 5, 1999 and returned to work on March 16, 1999.

The Office referred appellant for a second opinion evaluation with Dr. Bernard N. Stulberg, a Board-certified orthopedic surgeon, on March 15, 1999.³ In addition to the statement of accepted facts and the medical evidence of record, Dr. Stulberg received a copy of a video surveillance tape obtained by the employing establishment.⁴ On physical examination, he stated that his findings were consistent with mild cervical discomfort and rotator cuff impingement. In a report dated March 15, 1999, Dr. Stulberg opined that the claimant was capable of returning to work and performing the duties of the limited-duty job offer with the restrictions listed. Dr. Stulberg also noted that the claimant’s history indicated that she could suffer an aggravation of her symptoms if she engaged in activities that involve overhead reaching and heavy lifting on a regular basis and would “likely send this injured worker back to the treating physician.”

² Appellant agreed to work as a modified clerk in a sedentary position, sitting at a chair for four to eight hours per day but the job was given to another employee.

³ Appellant returned to limited-duty work on the day after this examination.

⁴ The record indicates that the employing establishment submitted a videotape obtained by a postal inspector. The videotape documented an investigation of the claimant that began in December 1998. The postal inspector apparently filmed the claimant running, driving, shopping, walking, lifting heavy objects, driving, pumping gas, bending over and twisting her head and neck.

Dr. Stulberg commented on a May 6, 1998 MRI report that revealed the presence of disc space abnormalities and early nerve root impingement. Dr. Stulberg noted that a return to “completely nonrestricted work environment might aggravate the underlying disc herniation to the point where surgical intervention might be necessary.”

In a follow-up report dated April 14, 1999, Dr. Stulberg clarified that appellant’s work restrictions were “preventative in nature to stop further pain, aggravation, or reinjury of her underlying condition.” He noted that “[t]here were few abnormal objective physical findings on the examination of March 15, 1999.”

In an April 30, 1999 report, Dr. Yosowitz reviewed Dr. Stulberg’s opinions and stated as follows:

“I agree with Dr. Stulberg that there are a few objective physical findings concerning [appellant]. However, she had an MRI of her cervical spine which indicates clearly a herniated cervical disc at C5-6. This is obviously a very objective finding. [Appellant’s] work restrictions are necessitated not only by her objective findings, but they are also preventive in nature to prevent her from aggravating her current symptoms.”

On June 8, 1999 appellant was advised by the Office that a conflict existed between Dr. Yosowitz and Dr. Stulberg as to whether or not her work restrictions were preventative in nature or based on “actual objective residuals which disable [appellant] from her date-of-injury job.” The Office therefore referred appellant for an impartial medical evaluation with Dr. Robert Mark Fumich, a Board-certified orthopedic surgeon, scheduled for June 17, 1999.

In a report dated August 24, 1999, Dr. Fumich reviewed a statement of accepted facts, a copy of the medical record and the surveillance videotape. Dr. Fumich reported physical findings and stated his opinion as follows:

“In your letter ... you request an opinion as to whether or not [appellant] is capable of returning to the job description and position at which she was employed at the time of the accident. From a functional point of view, based on the physical examination of today, one would anticipate she should be able to return to that position. She has no quantifiable functional deficits on physical examination today. However, I believe the present restrictions are reasonable, based on the recognized conditions of the herniated cervical disc, rotator cuff tear and [appellant’s] description that she becomes symptomatic with repetitive activities. The nature of her original job description is repetitive in the casing of mail and the carrying of 30[-pound] mailbags and or lifting of 70[-pound] mail sacks will cause recurrence of cervical disc symptoms. For your purpose, she was essentially asymptomatic on examination today and no deficits are present. Consequently, she could return to the original job description. As a physician, I do not advise this, since I believe, more likely than not, she will become symptomatic upon return. However, testing her or letting her return to such a position for a short period of time with observation by a physician for recurrence of symptoms, is reasonable.”

In a decision dated December 6, 1999, the Office terminated appellant's compensation finding that she was no longer disabled for her date-of-injury job as a letter carrier and that her current medical restrictions were only preventative in nature and were therefore not compensable. The Office stated that appellant's entitlement to medical benefits for her rotator cuff tear and herniated discs at C5-6 and C6-7 would continue.

Appellant disagreed with the Office's denial decision and requested an oral hearing, which was held on April 12, 2000.

In a report dated December 16, 1999, Dr. Yosowitz repeated his earlier recommendations that appellant engage in no heavy lifting, mail casing, or work above shoulder level. Dr. Yosowitz acknowledged that there were no objective findings to support continuing disability, but he also referenced the MRI report as objective evidence of the claimant's herniated disc. Dr. Yosowitz noted that appellant's work restrictions were permanent.

According to the case record, the claimant began treatment with Dr. Daniel J. Leizman, an orthopedist, in January 2000. In reports dated January 3 and February 29, 2000, he recommended no repetitive casing of mail, no lifting over 20 pounds and no working above the shoulder level.

Dr. Leizman ordered an MRI of appellant's cervical spine that was obtained on April 1, 2000 and showed degenerative disc disease at C4-5 and C5-6, spondylotic endplate prominence and annular bulging producing central canal stenosis. A nerve conduction study obtained on April 14, 1997 was negative for cervical radiculopathy.

Appellant appeared at the hearing with her attorney and testified that she had not seen the videotape. She acknowledged that she was able to perform some daily activities, but that the daily activities were markedly different from her duties as a letter carrier. Appellant confirmed that she did work as a PTF clerk for nine months and was able to perform the duties of that job. The claimant insisted she was not able to work in her prior job as a letter carrier because it involved casing, reaching and repetitive activities and involved lifting heavy sacks of mail.

After the hearing appellant submitted additional evidence. In a May 16, 2000 report, Dr. Leizman discussed the findings of the April 1, 2000 MRI. He opined that appellant's cervical disc herniation at C5-6 was "directly and causally related" to her work injury of February 2, 1995. He further opined that appellant was unable to perform gainful employment as a letter carrier and was restricted to limited-duty work.

In a July 28, 2000 decision, an Office hearing representative affirmed the Office's December 6, 1999 decision.

The Board finds that the Office met its burden of proof in terminating appellant's compensation effective December 6, 1999.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.⁵

⁵ *Mohamed Yunis*, 42 ECAB 325 (1991).

After it has been 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.⁶ Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁷ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.

In this case, the Office accepted that appellant sustained a torn rotator cuff, a right shoulder strain, cervical and thoracic strains, and herniated cervical discs at C5-6 and C6-7 due to her February 2, 1995 work injury. Appellant returned to work in a limited-duty job consistent with the work restrictions provided by her treating physician on March 16, 1999. When appellant returned to work, the Office properly found that a conflict existed in the medical record as to whether appellant's work restrictions were required due to residuals of her work injury or whether or not the restrictions were in place to prevent future injury. Dr. Stulberg, the Office referral physician, stated that appellant's work restrictions were "preventative in nature to stop further pain, aggravation or reinjury" while Dr. Yosowitz indicated that the restrictions were necessary due to the MRI evidence of a cervical disc herniation.

Section 8123 provides that, if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician to resolve the conflict.⁸ When a case is referred to an impartial medical specialist for the purpose of resolving the conflict in the medical opinion evidence, the opinion of the impartial medical specialist, if sufficiently well rationalized and based on a proper factual background must be given special weight.⁹

The Office referred appellant to Dr. Fumich to resolve the conflict between Drs. Yosowitz and Stulberg as to the purpose of appellant's work restrictions. Dr. Fumich performed a thorough examination of appellant and a review of the medical record. He opined that appellant could return to her prior job as a letter carrier but recommended against it because of the possibility of a recurrence of her symptoms. Dr. Fumich's opinion clarifies that there is no objective evidence of continuing disability due to appellant's work injury and her accepted conditions of a cervical disc herniation or torn rotator cuff. Because the Board finds Dr. Fumich's opinion to be well rationalized and based on a proper factual background, the Board concludes that it is entitled to special weight. Thus, the Board finds that, based on Dr. Fumich's opinion, appellant's work restrictions are to prevent future injury and the medical evidence establishes that she has no continuing disability due to her work injury. Accordingly, the Office met its burden of proof in terminating appellant's compensation.

⁶ *Id.*

⁷ *Furman G. Peake*, 41 ECAB 361 (1990).

⁸ 5 U.S.C. § 8123; *Robert D. Reynolds*, 49 ECAB 561 (1998); *Harry T. Mosier*, 49 ECAB 566 (1998).

⁹ *Sherry A. Hunt*, 49 ECAB 467 (1998); *Wiley Richey*, 49 ECAB 166 (1997).

The decision of the Office of Workers' Compensation Programs dated July 28, 2000 is hereby affirmed.

Dated, Washington, DC
April 26, 2002

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member