

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHELLY EMERY and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION HOSPITAL, West Haven, Conn.

*Docket No. 96-506; Submitted on the Record;
Issued March 19, 1998*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether appellant sustained a medical condition on or after May 10, 1994 causally related to factors of her federal employment.

On September 26, 1991 appellant, then a 47-year-old registered nurse, filed an occupational disease claim alleging that she sustained hypertension in December 1990 which she attributed to a heavy work load and staff shortages.

After a March 9, 1992 decision denying appellant's claim for compensation benefits, a decision by an Office of Workers' Compensation Programs hearing representative dated July 29, 1992 remanded the case for further development and a *de novo* decision as to whether appellant had sustained hypertension as a result of her employment activities and, if so, whether the aggravation was temporary or permanent.

In two statements dated December 15, 1992, appellant attributed her claimed hypertension condition to staff shortages, a heavy work load and a lowered interpersonal rating (attributed to retaliation for her memoranda to management about problems in the employing establishment).

In a report dated January 29, 1993, Dr. Alvan R. Feinstein, a Board-certified internist of professorial rank, provided findings on examination and diagnosed hypertension and obesity. Dr. Feinstein stated that the exact etiology of hypertension was difficult to state but that it seemed highly likely that the stresses and strains of appellant's federal employment had provided a substantial contribution to the elevation of her blood pressure and to her increased weight.

In a supplemental report dated February 26, 1993, Dr. Feinstein stated that the exact causes of hypertension and bulimia were unknown but that it was generally accepted that

interpersonal, intrapersonal, occupational and other sources of psychic stress often contributed to rises in blood pressure and to overeating. Dr. Feinstein stated:

“I thought it was more likely than not that [appellant’s] employment was a contributing fact. Since I do not know what her state was before the employment and exactly how her state has changed while employed, it is impossible to draw this conclusion with absolute certainty. According to the criterion of ‘is it more likely than not?’, my answer is ‘yes.’

“As for the specific employment conditions that may be causing problems, I refer you to your own statement of accepted facts dated December 23, 1992.¹ During my interview with her, [appellant] described the problems you listed plus several others that I did not record.”

On May 18, 1994 appellant filed a claim alleging a recurrence of disability on May 10, 1994 which she attributed to her December 1, 1990 employment injury, aggravation of hypertension.

By letter dated June 30, 1994, the Office accepted appellant’s claim for a recurrence of disability on May 10, 1994.

On August 31, 1994 appellant filed a Form CA-8 claiming disability commencing on June 27, 1994.

In a report dated September 22, 1994, Dr. Charles A. DiSabatino, Jr., a Board-certified internist specializing in rheumatology, stated that appellant had been treated for hypertension since 1986 and noted that in February 1990 her blood pressure was 140/90 and she had told him that she had a 100 percent increase in work load with no additional staff. He noted that in May 1994 after an argument with a supervisor, she experienced lights before her eyes and her blood pressure was 185/104. He stated that when appellant was under emotional stress her blood pressure rose and she had chest pain. Dr. DiSabatino stated, “[appellant’s] medical condition is stable as long as she is not forced to work under the conditions which she must work at her job at the [employing establishment]. This is the basis of my opinion about her disability.”

In a written statement dated September 28, 1994, appellant attributed her claimed May 10, 1994 recurrence of disability to feeling hurt when fellow employees complained that her periods of illness caused an increased work load for them and to staff shortages.

By decision dated November 2, 1994, the Office denied appellant’s claim for compensation benefits on the grounds that the evidence of record failed to establish that she had sustained a recurrence of disability on June 27, 1994 causally related to her December 1990 employment injury, aggravation of hypertension.

¹ The Board notes that only the first page of this statement of accepted facts is contained in the case record.

In an undated letter received by the Office on November 25, 1994, appellant attributed her claimed hypertension condition to staff shortages, long work hours and the stress of dealing with psychiatric patients.

In a report dated November 29, 1994, Dr. DiSabatino related that appellant had not experienced hypertension prior to February 1990 but that around this time her job was changed so that increased stresses were placed on her including the need for frequent crisis intervention with patients who were violent and disturbed. He stated that when appellant was under emotional stress at work her blood pressure rose and she had chest pain.

By decision dated November 30, 1994, the Office accepted that appellant sustained an aggravation of hypertension on December 1, 1990. The Office did not state whether the condition was accepted as a permanent aggravation or a temporary aggravation.

By letter dated November 30, 1994, appellant requested an examination of the written record by an Office hearing representative.

By letter dated December 1, 1994, the Office advised appellant that her claim for aggravation of hypertension on December 1, 1990 had been accepted on February 10, 1993 but the claims examiner had failed to send appellant a copy of the decision. The Office indicated that it appeared from appellant's claim form for a recurrence of disability on May 10, 1994 that there was a new exposure to stress at work which resulted in an increase in symptoms and therefore this would constitute a new injury and not a recurrence of disability.

By decision dated March 7, 1995, the Office hearing representative vacated the Office's November 2, 1994 decision and returned the file for further medical development. The hearing representative stated his findings that the Office had failed to resolve the issue of the extent and duration of appellant's employment-related aggravation of hypertension. The hearing representative noted that the Office had accepted a claimed recurrence of disability effective May 10, 1994 and that, since the Office had not met its burden to establish that the accepted aggravation of hypertension had ceased, the Office must immediately reinstate medical coverage of the accepted condition until such time that the Office could demonstrate that the accepted condition had ceased or was no longer employment related. The hearing representative stated that further development was required on the issue of the extent and nature of the hypertension condition and whether such aggravation was permanent or temporary. The representative noted that the Office should revise the statement of accepted facts to include appellant's December 15, 1992 statement. The hearing representative stated:

"The Office should resolve all issues in the claim, including the issue of whether the disability during and after May 1994 is causally related to the employment exposure.... The exact nature of [appellant's] job prior to the May and June 1994 recurrence of disability is unclear and the factual circumstances surrounding [appellant's] cessation of work are not established.... The Office should obtain all factual information surrounding the disability in May and June 1994 by telephone conference. The factual circumstances surround[ing] the claimed recurrence should be included in the Statement of Accepted Facts, with proper findings as to the compensability of the accepted events. The Office should

include a description of the physical requirements and job duties of the position held prior to the May/June 1994 recurrence.

“The Office should than refer [appellant] for multi-disciplinary evaluations with specialists in the fields of internal medicine and psychiatry for a second opinion. The physicians should be asked to provide an explanation as to whether the factors of employment specified as established and compensable in the Statement of Accepted Facts caused or contributed to the condition for which [appellant] seeks compensation. If aggravation is indicated, the physicians should be asked to state whether the aggravation is temporary or permanent. The physicians should be provided with the Office’s definition of aggravation to provide an informed and reliable opinion. Finally, the specialists should be asked to state whether [appellant] was precluded from performing her position during and after May 1994 based on an employment-related hypertension condition.

“The Office should than issue an appropriate final decision on [appellant’s] compensation and medical benefits if the weight of the medical evidence demonstrates [appellant] is not now suffering an employment-related hypertension condition, the Office must issue a pretermination notice prior to the termination of benefits.”

In a footnote at the end of the decision, the hearing representative stated that the Office had the discretion to treat the May 10, 1994 recurrence claim as a new claim and to double the case record for the 1990 employment injury into the case record for the new claim.

By letter dated April 7, 1995 following remand of the case by the Office’s Branch of Hearings and Review, the Office advised appellant that it had not been established that appellant’s need for medical treatment for the 1990 employment-related aggravation of hypertension had ceased, the Office would continue to pay for medical treatment. The Office stated that further development of the evidence was needed to determine the degree and nature of the hypertension condition and then a *de novo* decision would be issued.

In a memorandum to the file dated April 19, 1995, a supervisory claims examiner stated that it had been determined that appellant had alleged new factors of employment and therefore the May 10, 1994 recurrence claim should be developed as a new injury claim and the May 18, 1994 Form CA-2 recurrence of disability claim form would be treated as a claim for a new injury. The Office did not state what these new factors were.

By letter dated May 10, 1995, the Office advised appellant that the case record for appellant’s 1990 employment injury had been doubled into her claim for a recurrence of disability on May 10, 1994 but that the Office would treat the May 10, 1994 recurrence claim as a new injury claim.

By letter dated May 15, 1995, appellant noted that the claimed recurrence of disability on May 10, 1994 had previously been accepted and that the Office’s recent determination that it would treat the claimed May 10, 1994 recurrence of disability as a new injury was contradictory.

By decision dated November 8, 1995, the Office denied appellant's claim for compensation benefits on the grounds that the evidence of record did not establish that she sustained any disability or an emotional condition prior to May 10, 1994, causally related to factors of her employment. The Office stated that it had created a new claim in lieu of the claimed recurrence of disability by appellant. The Office stated that appellant had not provided factual or medical evidence supporting a new injury as of May 10, 1994.

The Board finds that this case is not in posture for a decision.

The record shows that appellant sustained an employment-related aggravation of hypertension in December 1990 and that the Office accepted, by decision dated June 30, 1994, that appellant sustained a recurrence of disability on May 10, 1994.

It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability had ceased or that it is no longer related to the employment.²

In this case, the Office has not met its burden of proof in establishing that appellant's employment-related aggravation of hypertension had ceased. In the March 7, 1995 decision, the Office hearing representative acknowledged that the Office had accepted the May 10, 1994 recurrence of disability claim and therefore the Office had the burden of proof to establish that the employment-related condition had resolved or that appellant's disability or medical condition was no longer causally related to the accepted employment injury. The hearing representative gave detailed instructions to the Office as to the issues that needed to be resolved and then, inexplicably, stated in a footnote that the Office also had the option of treating the May 10, 1994 recurrence of disability claim as a new claim. However, having accepted the May 10, 1994 recurrence of disability claim in its June 30, 1994 decision, the Office cannot simply ignore that decision and proceed to review the May 10, 1994 recurrence claim as a new claim. The Office must establish that the accepted injury has resolved or that the current disability or medical condition is not related to the employment injury.

² See *Alfonso G. Montoya*, 44 ECAB 193 (1992); *Gail D. Painton*, 41 ECAB 492 (1990); *Leona Z. Blair*, 37 ECAB 615 (1986).

The decisions of the Office of Workers' Compensation Programs dated November 8 and March 7, 1995 are set aside and the case is remanded for further action consistent with this decision of the Board.

Dated, Washington, D.C.
March 19, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member