

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of YVONNE R. MEEKS and DEPARTMENT OF VETERANS AFFAIRS,
PALO ALTO VETERANS HOSPITAL, Palo Alto, Calif.

*Docket No. 97-493; Submitted on the Record;
Issued October 22, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective June 8, 1996.

On August 11, 1978 appellant, a nursing assistant, sustained an injury while in the performance of duty when a patient fell and pinned her to the floor, causing her to strike her left side and back. The Office accepted her claim for lumbosacral and cervical strain. Appellant received compensation for temporary total disability until July 24, 1979 when she returned to duty. She subsequently sustained a recurrence of disability on October 27, 1979. Appellant returned to work in a light-duty position on January 20, 1980 and stopped work in August 1980. She has not worked since.

On July 7, 1992 Dr. Stephen D. Storey, an orthopedic surgeon, reported that appellant had been followed for years by an orthopedic surgeon who recently died. Dr. Storey examined appellant on July 7, 1992, related a brief history, described appellant's complaints and reported his findings on physical and x-ray examination. "In my opinion," he stated, "this woman shows evidence of a chronic low back strain." He started appellant on a course of physical therapy and prescribed medication. Dr. Storey stated that it was his opinion that appellant was not totally disabled, that with an exercise program she might well be physically able to return to some kind of gainful employment at some point. This might be difficult to accomplish, he stated, because appellant had not worked for 14 years.

On April 7, 1993 Dr. Storey reported that a magnetic resonance imaging (MRI) of appellant's lumbar spine showed a central disc herniation more to the left than the right at L5-S1.

Appellant began seeing a neurological consultant, Dr. Theodore Kaczmar, Jr., who provided the Office with progress reports.¹

On September 14, 1995 the Office referred appellant, together with a statement of accepted facts and copies of medical records, to Dr. Robert T. Badke, an orthopedic specialist, for a second opinion on the nature and extent of appellant's employment-related disability.

On November 20, 1995 Dr. Badke reported that he examined appellant that day. He related her history of injury, course of treatment and current complaints. Findings on physical examination included straight leg raising to 70 degrees bilaterally with back pain. Commenting on Dr. Storey's opinion that appellant had a chronic low back strain, Dr. Badke stated: "I find it hard to believe that a low back strain, of an uncomplicated nature, would persist for that period of time." After reviewing the medical records supplied by the Office, Dr. Badke offered the following opinion:

"It is my opinion that this patient suffered a minor musculo-ligamentous sprain/strain to her lumbar spine which was treated appropriately and conservatively by [her original attending physician]. She has had a recent MRI study performed, approximately 17 years following her original injury, which I think cannot justify the diagnosis of a ruptured disc based upon her initial injury. She is not a surgical candidate and is neurologically intact with totally normal physical findings with the exception of obesity.

"The diagnosis of a herniated lumbar disc is not connected, in my opinion, by direct cause, aggravation, precipitation or acceleration. It is probably true that the patient has been on temporary total disability since September 1, 1980, although this has never been verbalized or put into writing by any of the examining physicians as far as I can determine by reviewing the records.

"The patient, in my opinion, is now employable at her previous work. She has gone through a program of rehabilitation, both job-wise and also physical rehabilitation. Unfortunately, the patient cannot read nor can she drive a car because she cannot pass her driver's test.

"I do not believe the patient is a candidate for any further medical care or attention. No further tests or studies are indicated or warranted. Her condition is permanent and stationary, with her level of symptoms being minimal plus, intermittent and not of sufficient magnitude to be a physical impairment causing her to be disabled from working. A physical impairment at the present time, which is causing her some limitations, is her obesity which can be treatable, but on a nonindustrial basis."

¹ Dr. Kaczmar noted that although appellant had an L5 disc herniation, he recommended against surgery as she only exhibited transient radicular pain.

On April 1, 1996 Dr. Kaczmar reported that he saw appellant that day. He stated that appellant had been doing reasonably well with some mild persistent back pain until a month to six weeks earlier, when she experienced a flare up of pain unrelated to any specific injury or inciting event. He stated that appellant had persistent back pain of moderate severity in the left lower back with associated numbness in the left leg, which gave out on her on one occasion. An examination showed straight leg raising producing left thigh pain at 60 to 70 degrees in a sitting position. Dr. Kaczmar prescribed medication and a short course of physical therapy in a further effort to relieve appellant's pain. He scheduled appellant to return in three weeks and he stated that he might consider a repeat MRI should appellant's pain not respond to conservative measures.

On May 1, 1996 the Office issued a notice of proposed termination of compensation. The Office found that the weight of the medical evidence was represented by Dr. Badke, whose report was "far more recent" than the latest from Dr. Kaczmar² and who had reviewed appellant's medical records and the statement of accepted facts. The Office found that Dr. Kaczmar, on the other hand, had documented only subjective complaints of pain to substantiate any continuing disability.

On April 30, 1996 Dr. Kaczmar reported that appellant had experienced an improvement of approximately 50 percent in her pain with therapy and medication. He related her continuing complaints and extended her physical therapy for three to four additional weeks. Dr. Kaczmar anticipated shifting appellant to an independent exercise program if her improvement continued. The Office date-stamped this report received on May 16, 1996.

In a decision dated June 6, 1996, the Office terminated appellant's compensation benefits effective June 8, 1996. The Office noted that it had issued its notice of proposed termination of compensation on May 1, 1996 and that appellant had provided no additional evidence or argument in response. The Office found that the weight of the medical evidence rested with Dr. Badke and demonstrated that appellant no longer suffered from any residual medical condition or disability for work causally related to the work injury she sustained on August 11, 1978.

Appellant requested reconsideration and submitted in support thereof the May 31, 1996 report of Dr. Kaczmar, who indicated that appellant had nearly finished with her course of physical therapy and would be progressing to an independent exercise program. He stated that appellant continued to experience back and buttock pain. Dr. Kaczmar reported as follows:

"Parenthetically, I note that the [Office] now after some 18 years has decided to deny further medical payment for [appellant's] back injury. I only came on this case in 1993, some 15 years after her injury. This had been covered as a residual of her work injury through that time and as such, I did not address the issue of causation. However, I am aware of no subsequent injury to [appellant's] low back and it seems to me completely unreasonable now after all this time to

² Although Dr. Kaczmar's April 1, 1996 report appears in the case record prior to the Office's notice of proposed termination, the Office did not have this report, apparently, when it issued its notice.

suddenly deny her claim. [Appellant] will be seeking legal counsel in this regard.”

In a decision dated July 12, 1996, the Office denied a merit review of appellant’s claim on the grounds that the evidence submitted in support of her request for reconsideration was irrelevant and immaterial and was insufficient to warrant a review of the prior decision.

The Board finds that the Office failed to discharge its burden of proof to justify terminating appellant’s compensation benefits.

It is well established that, once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.³ 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.⁴ The Office’s procedure manual provides that, having accepted a claim and initiated payments, the Office may not terminate compensation without a positive demonstration, by the weight of evidence, that entitlement to benefits has ceased.⁵ The inadequacy or absence of a report in support of continuing benefits is not sufficient to support termination and benefits should not be suspended for that reason.⁶

The Office terminated appellant’s compensation benefits on the strength of Dr. Badke’s November 20, 1995 report. Dr. Badke, the Office referral physician, reported that he found it hard to believe that a low back strain of an uncomplicated nature would persist for such a period of time. He concluded that appellant was “now employable” at her previous work and that she needed no further medical care or attention. This opinion conflicts with that given by appellant’s attending physician, Dr. Storey, who reported that appellant had a chronic low back strain. Dr. Badke’s opinion also conflicts with the reports of Dr. Kaczmar, who prescribed medications, physical therapy and an independent exercise program.

The Board finds that due to the conflict in medical opinion, the report of Dr. Badke may not constitute the weight of the medical opinion evidence because an unresolved conflict exists with the reports of and Drs. Storey and Kaczmar on the issues of continuing residuals and disability causally related to the accepted employment injury. Consequently, the Office has not met its burden of proof to justify the termination of appellant’s compensation benefits.⁷

³ *Harold S. McGough*, 36 ECAB 332 (1984).

⁴ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.3 (July 1993).

⁶ *Id.*, Chapter 2.812.7(c)(1).

⁷ *Craig M. Crenshaw, Jr.*, 40 ECAB 919 (1989) (finding that the Office failed to meet its burden of proof in terminating the claimant’s benefits where it relied on the report of an Office referral physician without having resolved the existing conflict in medical opinion).

The June 6, 1996 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, D.C.
October 22, 1998

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member