U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROSEMARIE S. CULLING and DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Los Angeles, Calif.

Docket No. 97-2250; Submitted on the Record;
Issued June 24, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation effective September 5, 1996 on the grounds that she had no disability due to her December 6, 1988 employment injury after that date.

The Board finds that the Office met its burden of proof to terminate appellant's compensation effective September 5, 1996 on the grounds that she had no disability due to her December 6, 1988 employment injury after that date.

Under the Federal Employees' Compensation Act,[1] when employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation for the periods of disability related to the aggravation.[2] However, when the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased.[3] Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.[4] The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[5] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[6]

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[1] 5 U.S.C. §§ 8101-8193.

[2] *Richard T. DeVito,* 39 ECAB 668, 673 (1988); *Leroy R. Rupp,* 34 ECAB 427, 430 (1982).

[3] *Ann E. Kernander,* 37 ECAB 305, 310 (1986); *James L. Hearn,* 29 ECAB 278, 287 (1978).

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

[5] *Id.*

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

In the present case, the Office accepted that appellant sustained a left knee sprain on December 6, 1988 and paid appellant appropriate compensation. The Office determined that there was a conflict in the medical opinion between Dr. Douglas Garland, appellant's attending Board-certified orthopedic surgeon, and Dr. Daniel Kaplan, a Board-certified orthopedic surgeon acting as an Office referral physician, regarding whether appellant had continuing disability due to her December 6, 1988 employment injury.[7] In order to resolve the conflict, the Office properly referred appellant, pursuant to section 8123(a) of the Act, to Dr. Harold Katzman, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter.[8]

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.[9] By decision dated September 5, 1996, the Office terminated appellant's compensation effective that date based on the opinion of Dr. Katzman and, by decision dated March 17, 1997, the Office denied modification of its September 5, 1996 decision.[10]

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Katzman, the impartial medical specialist selected to resolve the conflict in the medical opinion. The April 24, 1995 report and February 15, 1996 supplemental report of Dr. Katzman establish that appellant ceased to have residuals of her December 6, 1988 employment injury.

The Board has carefully reviewed the opinion of Dr. Katzman and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. His 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, Dr. Katzman 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.[11] Dr. Katzman provided medical rationale for his opinion by explaining that the type of soft tissue injury sustained by

[7] In a report dated January 24, 1995, Dr. Garland indicated that appellant's December 6, 1988 injury continued to exacerbate her underlying degenerative arthritis; in a report dated March 6, 1995, Dr. Kaplan indicated that appellant no longer had residuals of her December 6, 1998 injury.

[8] 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).

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

[10] The record also contains January 9 and May 5, 1997 Office decisions regarding the approval of attorney fees but appellant has not requested review of these decisions by the Board.

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

appellant was of such a nature that it would have resolved by the time of his examination. Dr. Katzman explained appellant's continuing complaints by noting that they were solely due to her preexisting degenerative arthritis, a condition for which she had received treatment since 1984.[12]

The decisions of the Office of Workers' Compensation Programs dated March 17, 1997 and September 5, 1996 are affirmed.

Dated, Washington, D.C.
June 24, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member

[12] Appellant asserted that Dr. Katzman's opinion was not based on a complete and accurate factual and medical history because he did not accept that she sustained an injury on December 6, 1988. The Board notes that a complete reading of Dr. Katzman's reports shows that he did in fact acknowledge the occurrence of the December 6, 1988 employment injury.