

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA L. PASDEN and DEPARTMENT OF COMMERCE,
INTERNATIONAL TRADE ADMINISTRATION, Washington, DC

*Docket No. 00-975; Oral Argument Held March 14, 2001;
Issued April 20, 2001*

Appearances: *John Hoellen, Esq.*, for appellant; *Miriam D. Ozur, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective July 20, 1998.

The Office accepted that appellant's June 15, 1994 employment injury, sustained by a slip and fall on an escalator, resulted in a lumbosacral strain, L5-S1 herniated disc, radiculopathy and sciatica on the left side. Appellant received continuation of pay and was eventually placed on the periodic rolls. Appellant was removed from the employing establishment on December 6, 1996 due to continued unavailability for work and inability to perform the duties of her position as a senior import compliance specialist.

Appellant underwent treatment with Drs. Allen C. Egloff, a Board-certified orthopedic surgeon and Clifford T. Solomon, a Board-certified neurologic surgeon, until she came under the care of Dr. Frederick Sutter, a Board-certified physiatrist, on November 21, 1995. A modified functional capacity evaluation on June 28 and July 2, 1996 revealed no objective impairment which would prevent appellant from performing the duties of her job. Appellant was placed in a work hardening program, which was terminated in August 1996 due to appellant's fatigue. Appellant was referred to various physicians in an effort to determine the cause of the fatigue attacks. Appellant continued treatment with Dr. Sutter who noted that appellant was experiencing symptoms of fibromyalgia and chronic fatigue.

In an October 3, 1997 medical report, Dr. Sutter diagnosed post-traumatic musculoligamentous lumbosacral strain with residual myofascial and myofascial pain syndrome, residual contusion of the left vastus lateralis and secondary myofascial pain and left paramedian disc herniation at L5-S1. In addition, appellant had post-traumatic fibromyalgia syndrome associated with significant fatigue.

Dr. Sutter opined that although appellant has reached maximum medical improvement, she was no longer fit for duty as an import compliance specialist. Appellant had significant functional restrictions and actually failed a functional restoration program due to excessive fatigue. She was not able to sit or drive any more than a half hour or to work more than three to four hours at a time.

Dr. Sutter noted that it was nearly impossible to quantitate appellant's exact level of functional capacity due to limitations of fatigue. He added that she had some cognitive and short-term memory deficits that were evaluated by neurology with limited diagnostic results. Dr. Sutter suggested a more thorough evaluation by a neurologist.

The Office sought a second opinion from Dr. Robert E. Collins, a Board-certified orthopedic surgeon. In a report dated January 30, 1998, Dr. Collins noted the history of injury, reviewed the objective tests of record and reported that appellant's physical examination was markedly devoid of any positive findings. He opined that appellant had no residuals from her June 15, 1994 work injury.

Dr. Collins stated that although appellant apparently suffered a back strain with a herniated disc, he was not sure when the herniated disc occurred because previous x-rays indicated back strains prior to the work injury. Dr. Collins found no objective findings to indicate any sciatic nerve irritation or any residual from this injury. He opined that the herniated disc problem had resolved because appellant no longer had any sciatic-type pain and there was no evidence of any nerve irritation in her back, based on normal reflexes, sensation and straight leg raising. Dr. Collins cleared appellant to return to her previous occupation because he found no orthopedic significant problems or any evidence of a permanent disability. He noted that although appellant was diagnosed with some fibromyalgia and multiple pain spots, her physical examination was completely normal and devoid of any abnormal physical findings.

On June 19, 1998 the Office issued appellant a notice of proposed termination of compensation on the basis that the disability resulting from her employment injury had ceased. The Office granted appellant 30 days, in which to respond and stated that her compensation would not be terminated within this period. The accompanying memorandum discussing the evidence and the basis for the Office's proposed termination of compensation was signed by the senior claims examiner on June 22, 1998. No additional evidence was received.

By decision dated July 21, 1998, the Office terminated appellant's compensation effective that date on the basis that the weight of the medical evidence established that she was not disabled or in need of continuing medical treatment due to residuals of her June 15, 1994 employment injury.

By letter dated August 12, 1998, appellant requested reconsideration and submitted additional evidence. By decision dated September 14, 1998, the Office denied appellant's request for review on the grounds that the medical evidence she submitted referred to conditions other than those accepted as employment related and was thus irrelevant to the issue of termination.

In an undated letter which the Office received on July 21, 1999, appellant, through her attorney, requested reconsideration and submitted additional evidence. By decision dated October 18, 1999, the Office reviewed appellant's claim on the merits and denied modification of its prior decision.

The Board finds that the Office failed to meet its burden of proof in terminating appellant's compensation.

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.¹ The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.² The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.³

In this case, the Office accepted that appellant sustained a lumbosacral strain, L5-S1 herniated disc, radiculopathy and sciatica on the left side as a result of her June 15, 1994 employment injury. To justify terminating appellant's compensation, the Office relied on the January 30, 1998 report of Dr. Collins, a Board-certified orthopedic surgeon, who provided a second opinion evaluation. In his report, Dr. Collins cleared appellant to return to her previous occupation because he found no significant orthopedic problems or evidence of a permanent disability. The Board finds, however, that the October 3, 1997 report of Dr. Sutter, appellant's treating physiatrist, creates a conflict of medical opinion with that of Dr. Collins. Dr. Sutter opined that appellant's accepted employment conditions of lumbosacral strain and left paramedian disc herniation at L5-S1, along with other conditions of myofascial pain syndrome, fibromyalgia and significant fatigue, rendered appellant no longer fit for duty as an import compliance specialist.

Section 8123(a) of the Federal Employees' Compensation Act provides in 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."⁴

Because the October 3, 1997 medical report of Dr. Collins was before the Office prior to its termination of appellant's compensation, the Office improperly terminated appellant's compensation and is required to reinstate compensation pending resolution of the conflict of medical opinion between Drs. Collins and Sutter.

The Board will set aside the Office's October 18, 1999 decision, on the issue of whether appellant's accepted conditions have resolved and will remand the case to the Office for resolution of the conflict between Drs. Collins and Sutter. The Office shall refer appellant,

¹ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

² *Id.*

³ *See Mary Lou Barragy*, 46 ECAB 781 (1995); *see also Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁴ 5 U.S.C. § 8123(a).

together with the medical record and a statement of accepted facts, to an appropriate medical specialist for a well-reasoned opinion resolving whether appellant has continuing residuals from her accepted employment conditions.⁵ After such further development of the evidence as may be necessary, the Office shall issue an appropriate final decision.

The October 18, 1999 decision of the Office of Workers' Compensation Programs is reversed. The case is remanded for further action consistent with this opinion.

Dated, Washington, DC
April 20, 2001

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member

⁵ The Board notes that the Office has failed to determine whether appellant's accepted employment injury caused or contributed to other alleged employment-related conditions of fibromyalgia, myofascial pain, gastritis and a psychological condition. In a report dated September 21, 1995, Dr. Douglas D. Dykman, a Board-certified internist specializing in gastroenterology and hepatology, reported that he saw appellant on May 25, 1995 for right upper quadrant pain and burning which began when she started Voltaren. He noted that an upper endoscopy showed a chronic gastritis which could be secondary to nonsteroidal anti-inflammatory agents such as Voltaren. In an undated report which the Office received March 29, 1996, Dr. Richard M. Podolin, a licensed psychologist, stated that appellant was seen for evaluation and treatment following a referral from Dr. Sutter, for a moderate to high pain level and lack of sleep and depression due to problems she associated with an accident that she had experienced at work. Dr. Podolin reported psychological factors affecting physical condition and ruled out major depression. It was recommended that appellant receive treatment to educate her to a self-management model of control and to equip her with some self-management skills including biofeedback and relaxation training, cognitive/behavior interventions to improve, and treatment to improve her mood. In an October 3, 1997 report, Dr. Sutter indicated that his diagnostic impression from the work-related injury also resulted in myofascial pain, a residual contusion in the left vastus lateralis and post-traumatic fibromyalgia syndrome associated with significant fatigue. On remand, the Office shall properly develop this issue. *John L. Carlone*, 41 ECAB 354 (1989); *Daniel J. Gury*, 32 ECAB 261 (1980).