

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BERTHA L. SCOTT and DEPARTMENT OF THE NAVY,
CINC ATLANTIC FLEET, APO New York, NY

*Docket No. 00-272; Submitted on the Record;
Issued December 10, 2001*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective August 19, 1995.

On January 25, 1988 appellant, then a 45-year-old clerk working at the postal facility at a military base in Greece, sustained a lower back strain.

On October 6, 1992 the Office reduced appellant's compensation to \$30.00 a month based on her actual earnings as a receptionist and interviewer.

On July 13, 1994 appellant filed a claim for recurrence of disability commencing in May 1994 after being terminated from a private industry position as a receptionist/interviewer. She claimed that she was able to perform only sedentary work, that she still had severe back pain and that she had developed foot problems and an emotional condition causally related to her severe back pain.

In support of her claim, appellant submitted a letter dated January 7, 1992 from Dr. Robert E. Abraham, a Board-certified neurosurgeon, who stated that appellant was last seen in September 1991 when examination revealed a decreased range of motion and diffuse tenderness in the lumbar region. Subsequently, Dr. Abraham saw appellant for office visits on July 20 and October 29, 1992 when she reported walking two miles a day as exercise.

On a July 26, 1992 form report, Dr. Abraham noted appellant's symptoms as back and bilateral lower extremity pain; he related her inability to walk more than 200 yards at a time and diagnosed lumbar myofascial pain. Dr. Abraham stated that a magnetic resonance imaging (MRI) scan showed no major abnormalities and added that the prognosis was "good" for a functional lifestyle, but "poor" for any strenuous activity. He indicated that appellant would have occasional flare-ups.

On a form report dated November 25, 1992, Dr. Abraham noted that examination revealed negative straight leg raising, a tender sacroiliac joint and moderate muscle spasms in the paraspinous areas. He stated that the January 25, 1988 injury resulted in a “permanent defect” and was the “only cause” of appellant’s condition. He noted a normal MRI scan of the lumbar spine.

By report dated October 4, 1994, Dr. Abraham noted that appellant had had “difficulties” with her lumbar spine for more than six years, consistent with lumbar myofascial pain. He stated that she was “not able to perform work at any level on a consistent basis” and that she had had evaluations by other physicians that “may shed some light on her present condition.”

In a December 22, 1994 report, Dr. Abraham opined that appellant was “getting worse.” She claimed that she had a “knot” in the center of her back. He noted that appellant’s lower extremities gave her problems and that she could walk about a quarter of a mile. Dr. Abraham noted that straight leg raising was negative and that appellant had moderate tenderness and minimal muscle spasms in the paraspinous regions. He recommended walking for exercise.

The Office referred appellant, a statement of accepted facts, questions to be addressed and the relevant case record to Dr. Stuart B. McConkie, a Board-certified orthopedic surgeon, for a second opinion examination.

By report dated March 28, 1995, Dr. McConkie reviewed appellant’s factual and medical history, conducted a physical examination of her back including range of spinal motion, which he opined was “quite good,” and noted no leg atrophy, normal strength, equal reflexes, a negative Trendelenburg test, normal straight leg raising and no significant amount of spasm. Dr. McConkie opined, based on his physical examination and testing results: “I do not believe there is a significant amount of restriction in [appellant’s] back at this time and whatever mild strain may have been giving her some trouble of late, it should be noted that there have been a couple of years that her back has been normal and I do not believe her present complaints relate to her old difficulties at all. They are merely an indication that she is getting a little bit older and do not relate to her previous injury.” He completed a work capacity evaluation indicating that appellant could work eight hours a day; no physical restrictions were noted.

A computerized tomography (CT) scan on March 28, 1995 demonstrated “some mild facet hypertrophic changes, but no evidence of significant lumbar spine abnormality.”

An April 10, 1995 report from Dr. F. Richard Jordan, a Board-certified neurosurgeon, indicated that appellant complained of back and bilateral leg pain, worse on the left, and headaches. He noted appellant’s history of injury and treatment, reviewed appellant’s present complaints of worsening symptomatology, presented the results of physical examination, which were not definitive, and stated that with appellant’s worsening symptoms, further studies were needed.

An April 13, 1995 radiological report of a cervical MRI scan of the cervical spine noted mild posterior end plate spurring/bulge at C6-7 but no herniated nucleus pulposus. A lumbar MRI scan demonstrated a small left lateral herniated nucleus pulposus at L4-5. Dr. Jordan noted that the lumbar MRI scan demonstrated a small left lateral disc herniation at L4-5 and that the

cervical MRI scan showed spondylosis at C6-7. He opined that this was reason for appellant's arm and leg pain.

By letter dated June 13, 1995, the Office proposed termination of appellant's wage-loss compensation, based on the orthopedic report from Dr. McConkie. The Office noted that the other back conditions diagnosed, such as herniated nucleus pulposus, had not been accepted by the Office as employment related. The Office advised appellant that she had 30 days within which to submit additional argument or evidence if she disagreed with the proposed termination.

By decision dated August 14, 1995, the Office terminated appellant's wage-loss compensation on the grounds that she had no further disability after March 28, 1995, causally related to the accepted 1988 low back strain.¹

By letter dated August 16, 1995,² appellant requested an oral hearing, which was held on May 23, 1996. Appellant argued that the Office improperly referred her to a second opinion specialist, that his conclusions were speculative and unrationalized and that clarification of his report was required. By decision dated August 19, 1996, finalized August 20, 1996, the hearing representative found that the Office properly terminated appellant's wage-loss compensation based on the report of Dr. McConkie.

On August 25, 1995 appellant requested an appeal before the Board.³ On October 18, 1995 the Board issued an order dismissing appeal.

On March 6, 1997 appellant again appealed to the Board. On May 25, 1999 the Board remanded the case to the Office for reconstruction and proper assemblage of the case record, to be followed by a *de novo* decision to preserve appellant's appeal rights.⁴

By decision dated September 22, 1999, the Office reissued a merit decision, affirming the hearing representative's decision dated August 19, 1996, finalized August 20, 1996.

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.⁵ After it has determined that an employee has disability

¹ Although appellant alleged in her 1994 recurrence of disability claim that she sustained an emotional condition due to her accepted 1988 low back strain, no formal final decision has been issued by the Office on either a recurrence of disability beginning in May 1994 or a consequential emotional condition.

² On August 25, 1995 appellant filed an appeal before the Board (Docket No. 95-2733). However, appellant's representative indicated that appellant wanted an oral hearing before an Office hearing representative. On October 18, 1995 the Board dismissed the appeal.

³ This appeal was docketed as No. 95-2733.

⁴ Docket No. 97-504.

⁵ *Harold S. McGough*, 36 ECAB 332 (1984).

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 The Office met this burden through the well-rationalized reports of Dr. McConkie.

In 1995 Dr. McConkie reviewed appellant's factual and medical history, conducted a complete physical examination of appellant's back including range of spinal motion, which he opined was quite good, and noted normal testing and evaluation results. Dr. McConkie opined, based on his objective findings and testing results, that appellant's low back strain, from 1988 had resolved. Because Dr. McConkie's report was based upon a complete and accurate factual and medical history and on his objective physical examination and testing results, it is of probative value.⁷

Dr. Abraham provided several reports, but none of which contained a diagnosis of "low back strain." He opined that the January 25, 1988 injury resulted in a "permanent defect" and that was the "only cause" of appellant's condition, but he did not identify what, objectively, the defect was and provided no rationale to support this conclusion. Dr. Abraham did not explain what the condition was that was "getting worse," and he did not explain, pathophysiologically, how a soft tissue low back muscle strain in 1988 resulted in disability for work in 1995. Dr. Abraham opined that appellant had had difficulties with her lumbar spine for more than six years, but he attributed this to lumbar myofascial pain, rather than low back muscle strain and he failed to explain how appellant's employment caused or contributed to these "difficulties." These omissions and limitations render Dr. Abraham's opinions insufficiently probative to establish ongoing total disability or to create a conflict regarding the termination of appellant's injury-related disability.

Dr. Jordan's reports are inconclusive on the issue of appellant's low back strain, which he never discussed in terms of current disability. Dr. Jordan provided no opinion on whether appellant remained totally disabled, but instead merely identified "persistent back pain" which was "causing worsening symptoms." Causal relation was not discussed. Therefore, Dr. Jordan's opinions are insufficient to support appellant's claimed continuing total disability. The other medical reports of record, and particularly the psychiatric records, are irrelevant to the issue in this case; the Office has made no decision on appellant's recurrence of disability claim.

As no physician of record states, with rationale, that appellant still had disability for work or injury residuals requiring further medical treatment, the weight of the medical evidence of record rests with the report of Dr. McConkie who found that appellant had no further disability for work or injury residuals requiring further medical treatment, causally related to her 1988 low back strain injury.

⁶ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

⁷ *See John Watkins*, 47 ECAB 597 (1996); *Arthur Sims*, 46 ECAB 880 (1995).

The September 22, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
December 10, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member