

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BARBARA T. BURTON and U.S. POSTAL SERVICE,
POST OFFICE, Atlanta, GA

*Docket No. 99-2427; Submitted on the Record;
Issued March 2, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation and medical benefits effective September 13, 1998, on the grounds that she had no continuing disability casually related to her November 13, 1987 work injuries.

The Office accepted that on November 13, 1987 appellant, then a 39-year-old clerk, sustained low back and cervical strains as she picked up a tray of magazines. Appellant stopped work following the incident and did not return; she was placed on the periodic rolls for receipt of compensation.

In 1988 appellant came under the care of Dr. Joseph I. Hoffman, Jr., a Board-certified orthopedic surgeon, who treated her at regular intervals. Dr. Hoffman noted that a magnetic resonance imaging (MRI) in 1992 showed a herniated disc at L5-S1" and that appellant experienced "chronic lumbar and lower extremity discomfort."¹ Appellant did not require any physical therapy during 1995 but during 1996 two months of physical therapy significantly improved her symptomatology.

On January 30, 1997 Dr. Plas T. James, a Board-certified orthopedic surgeon, examined appellant and noted that she had a great deal of functional overlay on clinical examination. Radiologic findings showed a herniated cervical disc and lumbar disc degeneration. Dr. James opined that appellant could not perform the duties of a distribution clerk, but should be able to function in a sedentary desk job that did not require bending, twisting or lifting, particularly overhead.

On March 4, 1997 Dr. Hoffman noted that appellant had tenderness and spasm in her lumbar area paravertebral muscles with persistent radicular symptoms in her lower extremities.

¹ The Board notes that this condition was not accepted by the Office as being employment related and that, therefore, any disability due to this condition is not now compensable under the Federal Employees' Compensation Act.

A computerized tomography (CT) scan was recommended. Disc bulging was noted at L3-4, L4-5 and L5-S1 with findings of cervical spondylosis, particularly at the C5-6 level along with multiple levels of foraminal narrowing and facet degenerative disease at L4-5.

On June 12, 1997 appellant had an acute episode of low back pain after arising from an automobile seat, but neurological examination at that time was essentially normal. In the fall of 1997, appellant underwent lumbar epidural steroid injections/facet joint blocks and on December 2, 1997 she was noted to have continuing low back pain, increasing radicular symptoms in her lower right extremity.

On January 28, 1998 the employing establishment offered appellant a limited-duty assignment as a modified distribution clerk in a sedentary capacity verifying postage due mail. Appellant stated on February 4, 1998 that she was "unable to respond with an acceptance or rejection of this job offer at this time."

In support of her refusal, appellant submitted medical progress notes dated May 29 and July 13, 1998 from Dr. Hoffman which related that she had left shoulder subacromial bursitis and a severe episode of left upper extremity radicular pain associated with numbness and tingling of the left fingers and left trapezial tenderness upon cervical spinal range of motion.

On March 11, 1998 the Office referred appellant for a second opinion examination.

In a report dated March 30, 1998, Dr. Scott D. Boden, a Board-certified orthopedic surgeon, reviewed appellant's factual and medical history and noted that appellant refused to make any significant movements upon examination. Dr. Boden opined that appellant had abnormal pain behavior and symptom magnification, chronic neck and low back pain without any significant objective findings, chronic deconditioning and long-standing cervical spondylosis. Dr. Boden concluded:

"It is difficult with an 11-year history to say whether or not these diagnoses are still caused by the work injury in November of 1987. Undoubtedly, she has much secondary degeneration and deconditioning; and it is unclear as to why she would have such a severe reaction from the type of injury that she had back in 1987....

"I do not see any medical reasons based on her physical exam[ination] why she cannot be working, although, I think it is unlikely in her mind that she is going to even attempt to work."

Dr. Boden opined that, other than psychological support, it was unlikely that appellant would respond to any further medical treatment that he could offer her and that further diagnostic studies were not indicated. However, he recommended a formal functional capacity evaluation.

In a report dated June 18, 1998, Dr. Boden noted that the functional testing on May 12, 1998 was not successfully completed by appellant, as she did not perform the required tasks, claiming that her physician, Dr. Hoffman, had restricted lifting, carrying, pushing, pulling, squatting and bending. Appellant scored extremely high on pain rating scales with evidence of symptom magnification and exaggeration. Dr. Boden opined that, because he could not rate appellant's impairment quantitatively, there were no objective physical findings and all her

complaints of pain were simply subjective, there was no basis for him to restrict her activities whatsoever. Dr. Boden added that he was “unable to make any conclusion or determination as to [appellant’s] actual functional capacities, or for that matter, her actual impairment, due to her lack of putting forth a full effort.”

On July 7, 1998 the Office issued a notice of proposed termination of compensation finding that the report of Dr. Boden constituted the weight of the medical opinion evidence and established that appellant had no further disability or need for medical treatment, causally related to the accepted conditions of low back and cervical strains.

By letter dated August 4, 1998, appellant objected to the proposed termination, arguing that she was still under the care of Dr. Hoffman who was as well credentialed and qualified as Dr. Boden and who opined that she remained totally disabled.

On August 31, 1998 the Office finalized its termination of compensation, finding that appellant’s letter contained no medical evidence to refute the findings of Dr. Boden.

On September 25, 1998 appellant requested an oral hearing.

Appellant also submitted a November 24, 1998 report from Dr. Tapan K. Daftari, an orthopedic surgeon, who opined that it was possible that appellant’s current conditions were related to her employment injuries. Dr. Daftari also, however, opined that appellant’s condition could be due to degenerative disc disease and spondylosis.

Also submitted was medical evidence regarding appellant’s herniated disc and electromyography testing revealing cervical stenosis and left carpal tunnel syndrome, degenerative arthritis, osteophytes and multilevel spinal stenosis. A report dated July 10, 1998 from Dr. Hoffman was additionally submitted which opined that appellant was totally disabled and was unable to work.

The hearing was held on March 22, 1999 at which appellant testified.

By decision dated May 26, 1999, the hearing representative affirmed the August 31, 1998 decision, finding that Dr. Boden’s report continued to constitute the weight of the medical opinion evidence and that none of appellant’s physicians provided sufficient objective findings or medical rationale to establish that appellant remained totally disabled. The hearing representative also found that appellant had failed to establish that her employment resulted in her herniated disc condition or her carpal tunnel condition.

The Board finds that the Office has not met its burden of proof to terminate compensation and medical benefits due to an unresolved conflict in medical opinion evidence.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.² After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation

² *Harold S. McGough*, 36 ECAB 332 (1984). .

without establishing that the disability has ceased or that it is no longer related to the employment.³ Further, the right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for wage loss.⁴ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition that require further medical treatment.⁵ The Office has not met its burden in this case.

In this case, the Office accepted that on November 13, 1987 appellant sustained low back and cervical strains while in the performance of duty. She continued to receive treatment for these conditions, among others, in the years following their occurrence.

On March 4, 1997 Dr. Hoffman noted that appellant had tenderness and objective muscle spasm in her paravertebral musculature. On July 13, 1998 Dr. Hoffman noted that she had left trapezial tenderness upon cervical spinal range of motion, with objective numbness and tingling in the fingers of her left hand. On July 10, 1998 Dr. Hoffman opined that appellant remained temporarily totally disabled

However, the Office second opinion specialist, Dr. Boden, stated on March 30, 1998 that it was “difficult with an 11-year history to say whether or not these diagnoses are still caused by the work injury in November of 1987.” Dr. Boden concluded that, because appellant did not fully perform on the functional capacity evaluation and because it was, therefore, impossible to obtain an accurate assessment of her functional capabilities, no work restrictions were necessary.

However, this conclusion is presented as a penalty for not resolving the issue, rather than as a medical answer to what appellant’s working restrictions would be. Dr. Boden did not provide a clinical assessment of appellant’s physical capabilities or present medical reasoning in support of his conclusion that appellant could work without restrictions.

Dr. Boden felt that appellant would not benefit from any further treatment and that further diagnostic studies were not indicated, yet he identified a medical need for psychological support and counseling, which would, under the Act, constitute further medical treatment, possibly for residuals of her accepted employment-related injuries. Dr. Boden did not affirmatively state that appellant had no further medical residuals, either physical or psychological, which needed continuing medical or psychological treatment. Due to these defects, Dr. Boden’s reports cannot constitute the weight of the medical evidence in this case and merely raises a conflict as to whether appellant still suffers from some degree of disability causally related to her accepted employment-related injuries.

As Dr. Boden’s report does not constitute the weight of the medical opinion evidence on the issue of whether appellant continued to experience disability of some degree, but merely

³ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

⁴ *Marlene G. Owens*, 39 ECAB 1320 (1988).

⁵ *See Calvin S. Mays*, 39 ECAB 993 (1988); *Patricia Brazzell*, 38 ECAB 299 (1986); *Amy R. Rogers*, 32 ECAB 1429 (1981).

creates a conflict, the Office has not met its burden of proof to terminate appellant's compensation and medical benefits.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated May 26, 1999 and August 31, 1998 are hereby reversed.

Dated, Washington, DC
March 2, 2001

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member