U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KATHY WILSON and U.S. POSTAL SERVICE,
PROCESSING & DELIVERY CENTER, San Bernardino, CA

Docket No. 00-2157; Submitted on the Record;
Issued November 14, 2001

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits

Appellant, a 47-year-old clerk, filed a notice of traumatic injury on September 9, 1997 alleging that on September 2, 1997 she injured her lower back in the performance of duty. The Office accepted appellant's claim for lumbar strain on November 18, 1997. The Office authorized continuation of pay from September 3 to October 17, 1997 and wage-loss benefits from November 7, 1997 to February 27, 1998.

In a letter dated April 8, 1998, the Office proposed to terminate appellant's compensation benefits on the grounds that she had no residuals as a result of her accepted employment injury. The Office then undertook further development of appellant's claim. Following this development, the employing establishment offered appellant a light-duty position on November 25, 1998. Appellant returned to work on December 9, 1998 working six hours a day. In a letter dated December 10, 1998, the Office informed appellant that the offered position was suitable, noted her acceptance of the position and informed her of the penalty for failing to work once suitable work was secured.

Appellant continued to work in the suitable work position. By decision dated August 30, 1999, the Office found that appellant had no residuals of the September 2, 1997 employment injury. Appellant requested an oral hearing on September 27, 1999 and by decision dated March 20, 2000 and finalized March 21, 2000, the hearing representative affirmed the Office's August 30, 1999 decision.

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation and medical benefits.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[1]

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

After it has determined that an employee has disability causally related to 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.[2] Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.[3] To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment[4] which require further medical treatment.[5]

In this case, the Office found a conflict of medical opinion evidence between appellant's attending physician, Dr. H. Rahman, an orthopedic surgeon, who opined that appellant was totally disabled and the Office second opinion physician, Dr. Thomas R. Dorsey, a Board-certified orthopedic surgeon, who found that appellant accepted lumbar strain had resolved and that appellant had no disability or medical residuals. The Office properly referred appellant to Dr. Louis Lurie, a Board-certified orthopedic surgeon, for an impartial medical evaluation.[6]

In his August 6, 1998 report, Dr. Lurie noted appellant's history of injury and performed a physical examination. He provided medical restrictions due to appellant's accepted lumbar spine condition as well as due to her shoulder injuries.[7] Dr. Lurie completed a work restriction evaluation and indicated that appellant could work six hours a day. As noted, appellant returned to work on December 9, 1998 for six hours a day.

In a report dated April 12, 1999, Dr. Sunny Uppal, a Board-certified orthopedic surgeon, reviewed appellant's history of injury regarding her shoulder conditions and performed a physical examination. He found that appellant's low back had normal range of motion with no tenderness or muscle spasm to palpation. Dr. Uppal stated that appellant had no industrial injury with respect to her low back. He stated that appellant exaggerated her symptoms and that no further treatment was necessary.

The Office referred Dr. Uppal's report to Dr. Lurie and requested an additional report. The Office informed appellant that there was a conflict of medical opinion and that Dr. Lurie should address this conflict.

In a report dated June 22, 1999, Dr. Lurie performed a physical examination and stated that appellant's lumbar spine had full range of motion. He noted that he found no neurologic changes in appellant's lumbar spine and that her pain pattern did not conform to any particular

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[2] *Id.*

[3] *Furman G. Peake,* 41 ECAB 361, 364 (1990).

[4] *Id.*

[5] *Id.*

[6] Section 8123(a) of the Federal Employees' Compensation Act, provides: "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. §§ 8101-8193, 8123(a).

[7] In a separate claim, the Office accepted traumatic tendinitis and impingement of the left shoulder as well as right shoulder impingement syndrome and right shoulder arthroscopic surgery. The Office referred appellant for an impartial medical examination with Dr. Sunny Uppal, a Board-certified orthopedic surgeon, regarding these injuries. This claim is not before the Board on appeal and the Office has not combined the case files of these claims.

nerve root or dermatome. Dr. Lurie stated that his examination had not changed from August 6, 1998. He further stated that he agreed with Dr. Uppal that appellant exaggerated her back symptoms. Dr. Lurie concluded that appellant had subjective residuals as a result of her September 2, 1997 back injury. He stated that there were no objective medical findings to support these residuals. Dr. Lurie concluded that appellant did not require further treatment of her lumbar spine.

The Office properly referred appellant to Dr. Lurie in July 1998 to resolve an existing conflict of medical opinion evidence. In his August 6, 1998 report, he found that appellant had residuals of her lumbar strain which would require further treatment as well as work restrictions related to this condition. The Office properly relied on this report in determining that appellant could work six hours a day at the light-duty position offered by the employing establishment. Appellant accepted this position and continued to work six hours a day as directed by Dr. Lurie.

In a separate claim, the Office referred appellant for an impartial examination with Dr. Uppal regarding her shoulder conditions, restrictions and entitlement to a schedule award. Dr. Uppal found that appellant had no lumbar spine condition, relying on a statement of accepted facts that did not include her September 2, 1997 employment injury and resulting condition, and concluded that she had no disability or medical residuals due to this condition.

The Office then informed appellant and Dr. Lurie that there was an existing conflict of medical opinion evidence, provided Dr. Lurie with Dr. Uppal's report and then relied on the June 22, 1999 report from Dr. Lurie to terminate appellant's compensation and medical benefits without any pretermination notice.

The Board finds that Office improperly found a conflict of medical opinion evidence following Dr. Lurie's August 6, 1998 report. The Office relied on Dr. Lurie's August 6, 1998 report to determine that appellant could return to part-time work in a light-duty position and that the position offered by the employing establishment was suitable. There is no indication in the record that Dr. Lurie failed to comply with the requirements of an impartial medical report before the Office and there is no indication that the Office initially felt that his August 6, 1998 required clarification or supplementation.

In a separate claim, the Office found a conflict of medical opinion regarding appellant's shoulder conditions and disability. The Office referred this issue to Dr. Uppal. In his April 12, 1999 report, Dr. Uppal found that appellant had no current lumbar condition. This report cannot create a conflict with her August 6, 1998 report as neither Dr. Lurie nor Dr. Uppal are physicians for appellant.[8] The Board notes that Dr. Lurie's June 22, 1999 report constitutes a report from a second opinion physician, but as there was no existing conflict in the record this report is not entitled to the special weight accorded the report of an impartial medical examiner. The Board finds that this report is not sufficiently well rationalized to constitute the weight of the medical evidence and overcome the August 6, 1998 report which supported continuing work restrictions.

The Office is required by its procedure manual to issue pretermination notice in all cases where benefits are being paid on the periodic rolls.[9] In this case, the only pretermination notice

[8] 5 U.S.C. § 8123(a).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.6(a) (March 1997).

issued addressed the lack of medical residuals prior to the impartial medical examination by Dr. Lurie. Following that examination, the Office concluded that appellant had medical residuals which prevented her from returning to her date-of-injury full-time position. The employing establishment offered appellant a position which complied with her medical restrictions which appellant accepted. Appellant returned to work in this position.

The Office thereafter solicited additional medical evidence from Dr. Lurie which indicated that appellant could return to her date-of-injury position. The Office consequentially terminated appellant's compensation benefits without further pretermination notice. The Board this action violates due process and elementary fairness as the Office terminated appellant's compensation benefits on the original grounds without further notice that her benefits were at risk and despite her compliance with the correspondence that she received from the Office. Appellant accepted the position deemed suitable by the Office and continued to work in that position. The Office then terminated appellant's compensation on different grounds without informing her of its intention and allowing her an opportunity to respond.

As the weight of the medical evidence rests with Dr. Lurie's August 6, 1998 report, the Office has not met its burden of proof to terminate appellant's compensation or medical benefits.

The March 21, 2000 and August 30, 1999 decisions of the Office of Workers' Compensation Programs are hereby reversed.

Dated, Washington, DC
November 14, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member